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No.— 00-864 NOV 28 2000

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IN THE

Supreme Court of the United States

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, BERNADETTE BERNABEI, ANNETTE FOSTER-HALL, *et al.*,
Petitioners,

v.

AMERITECH BENEFIT PLAN COMMITTEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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89 pp

QUESTION PRESENTED

Do Title VII, the Equal Pay Act, and ERISA permit an employer to pay reduced retirement benefits, or deny early retirement opportunities, to female workers by utilizing facially discriminatory pregnancy leave rules that were originally adopted prior to the 1978 Pregnancy Discrimination Act?

PARTIES

The petitioners are the Communications Workers of America, AFL-CIO, Annette Foster-Hall, Bernadette Bernabei, and 945 other female present or former employees of the Ameritech Corporation, its predecessors or wholly owned subsidiaries. These additional petitioners are listed in Appendix D to the petition.

The respondents are the Ameritech Corporation, the Ameritech Pension Plan, the Ameritech Benefit Plan Committee, the Ameritech Management Pension Plan, the Ameritech Employees' Benefit Committee, and twenty-four wholly owned subsidiaries of the Ameritech Corporation. Those subsidiary firms are listed in Appendix E to the petition.*

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* Since the commencement of this litigation, the Ameritech Corporation has been acquired by the SBC Corporation. SBC now combines the telephone companies formerly known as Ameritech, Southwestern Bell, Pacific Bell, and Southern New England Telephone Co.

There is another case raising the same issues now pending against the Bell Atlantic Corporation. *EEOC v. Bell Atlantic Corp.*, 80 FEP Cases 164, 1999 U.S. Dist. LEXIS 8813, 1999 WL 386725 (S.D.N.Y. 1999). It is anticipated that a new action raising these issues will be commenced in the near future against AT&T. The resolution of this case would be largely determinative of pending EEOC charges or future claims by a large number of female employees against all of the corporations that prior to 1984 were subsidiaries or part of AT&T.

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Petitioners Communications Workers of America, AFL-CIO, Annette Foster-Hall, Bernadette Bernabei, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 13, 2000.

OPINIONS BELOW

The July 13, 2000, opinion of the court of appeals, which is reported at 220 F. 3d 814 (7th Cir. 2000), is set out at pp. 1a-19a of the Appendix to this Petition ("App."). The August 31, 2000, order of the court of appeals denying rehearing and rehearing en banc, is set out at pp. 40a-41a of the Appendix. The July 20, 1998, opinion of the district court, which is not officially reported, is reported at 1998 U.S.Dist. Lexis 11363 (N.D.Ill.) and at 1998 WL 419483 (N.D.Ill.), and is set out on pp. 20a-39a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 13, 2000. A timely petition for rehearing was denied on August 31, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

Section 701(k) of Title VII, 42 U.S.C. §2000e-(k), as amended by the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected

> but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a), provides in pertinent part, "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex . . . ."

Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), provides in pertinent part,

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority system . . . .

Section 706(e)(1) of Title VII, 42 U.S.C. §2000e-5(e)(1), provides in pertinent part,

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant relief or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . .

Section 706(e)(2) of Title VII, 42 U.S.C. §2000e-5(e)(2), as amended by the 1991 Civil Rights Act, provides:

> For the purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory

> purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

Section 206(d)(1) of the Equal Pay Act, 29 U.S.C. §206(d)(1), provides in pertinent part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system . . .

Section 404 of ERISA, 29 U.S.C. §1104(a)(1)(A)(i), provides in pertinent part that ERISA fiduciaries must act "solely in the interest of the participants and beneficiaries." Section 502 of ERISA, 29 U.S.C. §1132(a)(1)(B), authorizes a beneficiary to bring a civil action "to recover benefits due to him under the terms of the plan."

STATEMENT OF THE CASE

This case concerns the current utilization of rules, originally adopted prior to the Pregnancy Discrimination Act ("PDA"), which expressly discriminate against pregnant female employees. Before April 29, 1979, the effective date of the PDA, Ameritech[1] avowedly treated pregnancy-related disabilities

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[1] The respondents in this case, in addition to Ameritech, include two dozen Ameritech subsidiaries and certain employer run benefit committees. Ameritech itself only came into existence in the wake of the 1984

differently than other disabilities. Ameritech permitted all other employees who were absent from work because of a physical disability to continue to accrue seniority during the entire period of their disability leave. But until the PDA came into effect, female workers who were on pregnancy leave were treated less favorably. "For most of the time prior to the advent of the PDA, Ameritech had counted only a maximum of 30 days of an employee's pregnancy or maternity leave towards her N[et] C[redited] S[ervice]. . . . In contrast, employees with other disabilities were granted full . . . credit for their disability-related leaves." App. 3a.[2]

In determining whether a worker is eligible for a pension, and in calculating the amount of her benefits, Ameritech reduces her total term of employment in the manner provided by its pre-PDA pregnancy leave policies. App. 4a, 23a. Beginning in 1991, Ameritech's utilization of pre-PDA pregnancy leave policies to calculate a worker's total term of employment became a matter of significant importance to thousands of its female employees. Between 1991 and 1994, Ameritech created several different early retirement plans, each of which provided generous financial incentives for eligible workers who chose to retire before the age of 65. The most important of these was the Ameritech Pension Plan Early Retirement Program ("APPEP"); it provided that, for purposes of determining retirement eligibility and in calculating the amount of benefits, workers who retired between February 22, 1994 and September 30, 1995, would have three years of age added to their actual age and three years of employment added to their term of employment. App. 2a, 4a, 22a-23a. The APPEP provided other lucrative benefits to eligible early retirees, including up to

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AT&T divestiture. For simplicity, however, we refer to all of these entities as Ameritech.

[2] For much if not all of this period Ameritech engaged in other practices which had the effect of prolonging the period of pregnancy leave. App. 3a.

$3,000 for pre-approved educational expenses and a one-time cash payment of approximately $25,000. App. 4a.

Many female "employees who had taken pregnancy or maternity leaves prior to April 29, 1979 . . . did not receive the added 1994 benefits even though they would have been eligible if they had been disabled in any other way." App. 4a. Disputes about the interpretation and legality of these early retirement plans arose as soon as the first of them was announced in 1991. Ultimately a total of 1,800 female workers filed claims with Ameritech, asking that their term of employment not be reduced by the period of time when they were on pregnancy leave.[3] Many of these workers were represented by petitioner Communications Workers of America, ("CWA"), which also sought without success to resolve the dispute through negotiations with Ameritech.

Much of the dispute focussed on a Ninth Circuit decision in *Pallas v. Pacific Bell*, 940 F. 2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). The Ninth Circuit in *Pallas* had held that both Title VII of the 1964 Civil Rights Act and ERISA forbade Pacific Bell, when determining eligibility for a newly adopted early retirement plan, from deducting a worker's pre-PDA pregnancy leave from her service credit. In negotiations with Ameritech officials, representatives of the CWA invoked *Pallas* and argued that the company should comply with the holding in that case. Many of the hundreds of written

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[3] In 1996 a district court in Michigan held that this reapplication of Ameritech's pre-PDA pregnancy leave rules to one of the pre-APPEP early retirement plans violated section 1104 of ERISA. *Sweeney v. Employees' Benefit Committee of Ameritech*, No. 93-CV-74302 (E.D.Mich. 1996) (Memorandum Opinion of March 29, 1996). The court's conclusion was premised on its finding that utilization of these pre-PDA policies violated Title VII itself. Subsequently the parties to this action agreed to a settlement, and jointly stipulated to an order vacating this opinion and dismissing the action. The district court granted that request.

appeals filed by female employees expressly cited and relied on *Pallas*.[4]

Ameritech's attorneys, however, advised the company that the Ninth Circuit's decision in *Pallas* was incorrect, and urged the company to disregard it.[5] They also insisted that prior to the PDA it was perfectly legal for Ameritech to deny to pregnant workers the service credit that was accorded to all other disabled employees.[6] In the wake of that advice, company officials were expressly instructed that they should not consider the *Pallas* decision.[7] In rejecting the employee appeals that had invoked the *Pallas* decision, Ameritech officials responded that in the company's view the Ninth Circuit had misconstrued federal law.[8]

The first lawsuit to challenge the administration of APPEP was an individual action commenced by petitioner Bernadette Bernabei in February, 1995, in the district court for the Northern District of Ohio. Bernabei asserted that reutilization of the pre-PDA pregnancy leave policies to deny APPEP benefits violated Title VII, the Equal Pay Act, ERISA, and state law. App. 4a.

In March, 1997, Ameritech commenced an action of its own in the Northern District of Illinois. It sued two unions (including petitioner CWA), as well as petitioner Foster-Hall and thirty-six other workers as representatives of a class of some

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[4] Seventh Circuit Appendix of Appellants, Nos. 98-3096, 98-3101, and 98-3102, p. 162.

[5] Joint Exhibits, v. 3, exhibit 24. Letter of Michael S. Horne to Walter Oliver, March 15, 1995, pp. 13-16.

[6] *Id.* at 1, 7-10.

[7] *See e.g.*, Plaintiffs' Exhibits, v. 3, Exhibit 4 to Deposition of Harry Malone, pp. 000040424, 000040426.

[8] Seventh Circuit Appendix of Appellants, *supra*, pp. 151, 169.

7,000[9] female employees who had taken pregnancy leaves prior to the PDA. Ameritech sought a declaratory judgment that the use of its pre-PDA policies to determine a new retirement benefit did not violate Title VII, ERISA, the Equal Pay Act, or various state laws. Petitioners CWA and the named employees counterclaimed for relief under those statutes, and more than 910 other female Ameritech employees, also petitioners here, intervened in the Illinois proceeding. In August, 1997, EEOC filed suit in the Northern District of Ohio on behalf of the same 7,000 Ameritech workers, contending that the continued use of pre-PDA pregnancy leave policies to calculate current pension eligibility violated Title VII and the Equal Pay Act.[10] Ultimately, Bernabei's lawsuit was transferred to the Illinois federal court and consolidated with the Ameritech declaratory judgment action.[11] App. 4a-5a.

In August, 1997, the Illinois district court granted the parties' joint request to certify a class consisting of all female employees and retirees who had taken pregnancy leaves between the effective date of Title VII and the effective date of the Pregnancy Discrimination Act.[12] The parties subsequently filed cross-motions for summary judgment. App. 5a.

On July 20, 1998, the district court granted Ameritech's motion. The court acknowledged that the dispute presented "close and difficult questions," and that Ameritech's actions would be

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[9] In addition to approximately 1,800 female employees who filed claims regarding the early retirement plans, this action, as well as that of the EEOC, also sought resolution of the rights of some additional 5,200 female employees.

[10] *EEOC v. Ameritech Services, Inc.*, No. 97 CV 2106 (N.D. Ohio August 15, 1997).

[11] The Ohio district court never acted on Ameritech's motion to transfer the EEOC action to Illinois. Proceedings in that action have remained in abeyance pending final disposition of the *Ameritech* and *Bernabei* actions.

[12] The class was certified as to the Title VII, ERISA, and state law claims, but not the Equal Pay Act issues. App. 10a.

illegal under both the Ninth Circuit decision in *Pallas* and a Second Circuit decision in *Pollis v. New School for Social Research*, 132 F. 3d 115 (2d Cir. 1997). App. 30a, 34a-35a. The district judge, however, insisted that both *Pallas* and *Pollis* were wrongly decided. App. 30a, 35a. The district court concluded that Ameritech's reutilization of the pre-PDA policies did not violate the PDA, Title VII, the Equal Pay Act, or ERISA.[13] App. 38a-39a.

The court of appeals affirmed this interpretation of those federal statutes. The Seventh Circuit recognized, as had the Ninth Circuit in *Pallas*, that the controlling question was whether the legality of the practices in question was controlled by this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), or by *United Air Lines v. Evans*, 431 U.S. 553 (1977). *Compare* App. 12a *with Pallas*, 940 F. 2d at 1326-27. The court below acknowledged that the distinction between *Bazemore* and *Evans* was "subtle at best" (App. 14a); unlike the Ninth Circuit in *Pallas*, however, it concluded that *Evans* controlled.

For the court of appeals, the critical issue was that, prior to the adoption of the PDA, Ameritech had already calculated a "net credited service" date for each of its female employees. The Seventh Circuit held that Ameritech's pregnancy leave policies were lawful before the adoption of the PDA itself. App. 15a. Once a net credited service date calculation had been made pursuant to those policies, the court believed, Ameritech could thereafter choose to use that net credited service date to deny benefits under later, newly created retirement programs. App. 14a-16a.

The Seventh Circuit, however, disapproved the class certification. The court recognized that its decision left all of the non-party Ameritech employees in the Seventh Circuit free to

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[13] The court also held that the disputed practices did not violate state law. (App.—).

bring new actions against the company. The panel also noted that the EEOC's Ohio action could therefore proceed. 10a-11a.[14]

On July 27, 2000, Ameritech filed a timely petition for rehearing and suggestion for rehearing en banc seeking review of the panel's disapproval of class certification. That petition was denied on August 31, 2000.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE WHICH WILL AFFECT, INTER ALIA, THE RETIREMENT RIGHTS OF TENS OF THOUSANDS OF CURRENT AND RETIRED FEMALE EMPLOYEES WHO WORKED FOR AT&T AND ITS SUBSIDIARIES PRIOR TO THE PREGNANCY DISCRIMINATION ACT

This case presents a problem of national scope and increasing urgency threatening the retirement rights of large numbers of women because of their pregnancies in the 1960s and 1970s. A significant proportion of this generation of women was, like the petitioners, denied credited service because of their pregnancies, while men with any type of disability were given full credit. This practice was widespread prior to the adoption in 1978 of the Pregnancy Discrimination Act. *See, e.g.* S. Rep. No. 95-331, pp. 6,8. Today, the generation of women who were the victims of this discrimination is reaching retirement age. Because the amount of a worker's accrued service usually determines eligibility for, and the amount of, retirement benefits, large numbers of women are at risk of

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[14] "[O]ur ruling in this action will not formally preclude the EEOC in its Ohio action, since the Commission is also not a party before this court. The Ohio court, and the Sixth Circuit in turn should an appeal be taken, will have the right to come to their own conclusions on these issues." App. 11a.

receiving smaller pensions and other retirement benefits than men who were hired at the same period and who held the same jobs. Most litigation to date has concerned the denial, as here, of early retirement benefits; the magnitude of the problem will swell as more women of this generation reach regular retirement age.

The discriminatory policies of pre-divesture AT&T were typical of this problem, and by themselves affected tens of thousands of female workers. Prior to divestiture, AT&T and its subsidiaries in the telephone industry were among the largest private employers of women in the nation. In the case of Ameritech alone, the retirement benefits of approximately 7,000 women are at stake. A case now pending in the Southern District of New York, which raises essentially the same issues regarding the practices of the phone companies in New York and several New England states, will determine the pension rights of at least 5,000 older women workers. There are tens of thousands of female employees at AT&T and its other former subsidiaries whose retirement benefits remain in question. And the discriminatory practices that were national policy within AT&T prior to 1979 were also utilized by other major employers prior to the adoption of the Pregnancy Discrimination Act. *See e.g. Harriss v. Pan American World Airways, Inc.*, 649 F. 2d 670 (9th Cir. 1980); *Greenspan v. Automobile Club of Michigan*, 495 F. Supp. 1021 (E.D.Mich. 1980).

It is of particular importance that this Court definitively resolve *now* whether female workers can be paid reduced retirement benefits because of pregnancies earlier in their careers. For many of the victims of the practices at issue in this case, benefits delayed will be benefits irretrievably denied.

Where, as here, one of the benefits in dispute is the opportunity to take early retirement, any delay in resolving that issue is likely to nullify the rights of the victims. For example, one of the key benefits in question at Ameritech was the right to take

early retirement in 1994 or 1995, rather than in 1997-1998. After five years of litigation, that opportunity no longer exists; the plaintiffs have monetary claims, but there is no way they can get back the three years of retirement that they have now lost. Another benefit sought in this case was a grant of up to $3000 for education that would permit retirees to obtain training for new jobs. Even if petitioners ultimately prevail, they will have lost several years during which they might have utilized that training to start new careers. Women retiring at the typical age of 65 to 70 face a more fundamental problem; if there are substantial delays in resolving disputes about the level of their retirement benefits, an ever increasing portion of this group will not live long enough to enjoy the result of any ultimate legal victory. Unless this Court acts expeditiously to resolve the legal issues raised in this case, the ensuing delay will nullify in many cases the Title VII and other federal rights of a large number of women.

Employers too have a substantial interest in the prompt and definitive resolution of these issues. Because at many major companies there are a very large number of female workers whose retirement benefits necessarily would turn on the legal questions presented by this petition, employers need a conclusive determination of those questions in order to make decisions with substantial financial implications about benefits and benefit plans. For that reason, employers have taken the uncommon step of commencing suit themselves to resolve these questions, rather than passively awaiting legal action by employees. In the instant case, for example, the court of appeals observed that "[i]n an unusual move, Ameritech jumped into court with an action for a declaratory judgment . . . ." App. 2a. In two other recent cases, employers have tried to resolve the issue by bringing a preemptive suit against EEOC, seeking a judicial determination that their practices were lawful and therefore could not be investigated by the

Commission.[15] In both instances the lower courts concluded that this method of clarifying the law was not available to employers under Title VII. And in the instant case the Seventh Circuit held that Ameritech could not even obtain in the lower courts a definitive resolution of its obligations to its own employees, leaving Ameritech still subject to suit by its employees or by EEOC in the Sixth Circuit, where Seventh Circuit precedent would not be controlling, and even in the Seventh Circuit by other plaintiffs hopeful that the decision below might ultimately be overturned by the Seventh Circuit en banc or by this Court.

The inter-circuit conflict described *infra* makes the need for action by this Court particularly pressing. Many of the employers whose retirement practices are at issue have offices and employees in several states located in different circuits. Respondent Ameritech is now a subsidiary of SBC, a telephone company with subsidiaries in the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits.[16] Thus in determining the retirement benefits which it will pay to its employees, SBC is subject to conflicting legal standards. Other nationwide employers that emerged from the 1984 divestiture, including AT&T and Lucent Technologies, also have employees in multiple states and face a similar situation.

This case provides an appropriate vehicle for definitively resolving these issues. The claims and counterclaims in this case squarely present questions about the legality of Ameritech's current practices under all three of the applicable federal laws—Title VII, the Equal Pay Act, and ERISA. The

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[15] *Bell Atlantic Cash Balance Plan v. E.E.O.C.*, 976 F. Supp. 376 (E.D.Va. 1997), *aff'd*, 182 F. 3d 906 (4th Cir. 1999), 1999 WL 485679 (4th Cir, July 12, 1999); *AT&T Corp. v. EEOC*, 99 Civ. 1444 (TFH) (D.D.C. July 13, 2000), *appeal docketed* No. 00-5280 (D.C. Cir. Aug. 4, 2000).

[16] SBC has subsidiaries in California, Nevada, Illinois, Hawaii, Ohio, Michigan, Indiana, Wisconsin, Texas, Kansas, Missouri, Oklahoma and Arkansas.

documentary record assembled in the district court presents a clear picture of the manner in which pregnancy leaves were handled prior to the PDA, and of the way in which Ameritech's pre-PDA pregnancy leave policies are currently being used to determine eligibility for early retirement benefits and to calculate the amount of regular pension checks. These policies are representative of the practices that existed throughout the Bell system prior to the PDA.

II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN FOUR OTHER CIRCUITS AND EEOC'S INTERPRETATION OF TITLE VII

(1) The decision below is squarely inconsistent with the decision of the Ninth Circuit in *Pallas v. Pacific Bell*, 940 F. 2d 1324, (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). In *Pallas* the defendants, like Ameritech, had been subsidiaries of AT&T prior to the 1984 divestiture; the pre-PDA policies in *Pallas* were essentially the same as those in the instant case, and Pacific Bell, as here, had invoked those policies to exclude women from a post-PDA early retirement program. In determining how many years of service Ms. Pallas had, and in concluding that she was ineligible to participate in its new early retirement program, Pacific Bell had excluded most of the period in 1972 when she was on pregnancy leave. The Ninth Circuit held that that was a current per se violation of Title VII.

> [T]he discriminatory program which gave rise to this suit, the Early Retirement Opportunity, was instituted in 1987 . . . . In 1987, Pacific Bell instituted a program that adopted, and thereby perpetuated, acts of discrimination which occurred prior to the enactment of the Pregnancy Discrimination Act. While the act of discriminating against Pallas in 1972 is not itself, actionable, Pacific Bell is liable for its decision to discriminate against Pallas in 1987 on the basis of pregnancy.

940 F. 2d at 1326-27.

The Ninth Circuit in *Pallas* concluded that, in determining the legality of the practice at issue in these cases, "[t]he controlling Supreme Court precedent is *Bazemore v. Friday*", 940 F. 2d at 1327, and held that "[t]he district court erred in relying on *[United Airlines v.] Evans*." 940 F. 2d at 1326. In the instant case the Seventh Circuit reached the opposite conclusion, insisting that "we should look first to *Evans* and follow [*Bazemore*] only if there is no alternative." App. 14a. The Ninth Circuit recognized the rules being utilized were facially discriminatory.

> [T]he net credit seniority system used to calculate eligibility under the Early Retirement Opportunity is not facially neutral. The system used to determine eligibility facially discriminates against pregnant women.

940 F. 2d at 1327. The Seventh Circuit, on the other hand, held that the identical plan utilized by respondent was *not* "the kind of intentional discrimination that would trigger the exception to the statutory protection afforded to seniority systems." App. 15a.

Throughout the dispute about its practices, Ameritech has been well aware that the manner in which it determines retirement benefits would be illegal in the Ninth Circuit under *Pallas*. In March, 1995, Ameritech's attorneys called its attention to the decision in *Pallas*, and correctly noted that what the respondents proposed to do could only be upheld if the courts in the Seventh Circuit were to conclude that *Pallas* was wrongly decided. Most of the written requests that respondent received in 1994-95 from women seeking credit for the period of their pregnancies relied on *Pallas*; respondent's rejection of those claims expressly asserted its view that *Pallas* was wrong.

In upholding the practices in this case, the district court explained that it "finds *Pallas* unpersuasive and respectfully declines to follow it." App. 30a. A subsequent district court

decision in the Southern District of New York, recognizing the conflict between *Pallas* and the decision in this case, chose to follow *Pallas* because it was convinced that "the *Ameritech* decision was wrongly decided." *EEOC v. Bell Atlantic Corp.*, 80 FEP Cases 164, 1999 U.S. Dist. LEXIS 8813, 1999 WL 386725 *4 (S.D.N.Y. 1999). In the Seventh Circuit the central contention successfully advanced by respondents was that "[t]he majority opinion in *Pallas* was wrong."[17]

The Seventh Circuit's decision conflicts as well with the analysis of the Tenth Circuit in *Whitehead v. Oklahoma Gas & Electric Co.*, 187 F. 3d 1184 (10th Cir. 1999). The plaintiff in that case had lost accrued seniority rights when she was fired because of her pregnancy; although she was later rehired, the employer declined to restore those lost rights by "bridging" the period when she was not employed. That loss of seniority later rendered Whitehead ineligible for certain early retirement benefits. The court of appeals held that the earlier dismissal was no longer actionable, relying on *Evans*. However, the loss of seniority would be a current violation, the Tenth Circuit reasoned, if men who had left the company's employement had been permitted to retain previously accrued seniority while women dismissed because of pregnancy were not.

> The proper comparison group for Whitehead's claim would be men who also stopped working for OG&E during the same time periods. Such men . . . have not had their prior time of employment bridged, just like Whitehead.

187 F. 2d at 1193. The instant case falls squarely within the rationale of *Whitehead*; the proper comparison group, men who were disabled, were permitted to continue to accrue service credit while pregnant women were not.

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[17] Brief of Appellees, Nos. 98-3096, 98-3101, 98-3102, p. 19.

The decision below is also in direct conflict with EEOC's longstanding and consistent interpretation of Title VII. The Commission "disagrees with the court's analysis in *Ameritech* and believes that the *Pallas* decision states the correct application of the law."[18] EEOC Guidelines issued in 1972[19] insisted even before the adoption of the PDA that employers were required by Title VII to treat disabilities caused by pregnancy or related medical conditions the same as all other disabilities for all employment purposes, including benefit and retirement plans and seniority accrual. 29 C.F.R. §1604.10; App. A. to §1610.11.[20] EEOC's Compliance Manual explicitly interprets Title VII to prohibit employers from using discriminatory pre-PDA pregnancy leave rules today to determine current retirement benefits.[21] The Commission has repeatedly adhered to that interpretation of Title VII in litigation regarding current utilization of pre-PDA pregnancy leave seniority practices.[22]

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[18] EEOC Compliance Manual, No. 915.003 (Oct. 3, 2000), "Employee Benefits," §III, B, n. 96.

[19] In enacting the PDA, Congress recognized that "these guidelines rightly implemented the Title VII prohibition of sex discrimination in the 1964 act." H.R.Rep. No. 95-948, p. 2; S.Rep. No. 95-331, p.2.

[20] "[T]itle VII has always prohibited an employer from failing to accord a woman on pregnancy-related leave the same seniority . . . accrual accorded those on other disability leaves."

[21] EEOC Compliance Manual, No. 915.003, (Oct. 3, 2000), "Employee Benefits," §III, B (If "[i]n evaluating eligibility for early retirement in 1996, the employer has distinguished between employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities . . . the employer's decision to incorporate that denial of service credit in calculating seniority in 1996 is discriminatory.")

[22] *See, e.g.*, Complaint, *EEOC v. Ameritech Services, Inc.*, 97 CV 2106 (N.D.Ohio August 15, 1997); Complaint, *EEOC, et al. v. Bell Atlantic Corp, et al.*, 97 CIV 6723 (D.C.) (S.D.N.Y. Sept. 10, 1997); Brief Amicus Curiae, *Carter v. AT&T Corp.*, No. 95-3213 (6th Cir. 1995).

(2) The linchpin of the Seventh Circuit's holding that respondents' pregnancy leave policies are not facially discriminatory was its assertion that those practices had been legal prior to the adoption of the PDA. App. 15a. The courts of appeals are divided about that issue as well. In addition to the Seventh Circuit, the Eighth Circuit has held that before the PDA it was legal under Title VII to deny seniority credit to women on pregnancy leave, even though workers with all other disabilities received such credit. *Southwestern Bell Tel. Co. Maternity Benefit Litigation*, 602 F. 2d 845, 848-49 (8th Cir. 1979). On the other hand, the Third and Ninth Circuits held that such seniority credit practices were illegal even prior to the adoption of the Pregnancy Discrimination Act. *Eberts v. Westinghouse Elec. Corp.*, 581 F. 2d 357, 361-62 (3d Cir. 1978); *Harriss v. Pan American World Airways, Inc.*, 649 F. 2d 670, 678 (9th Cir. 1980). If, as the Seventh Circuit believed, the legality of a current reutilization of pre-PDA pregnancy leave policies depends on whether those policies were lawful prior to the adoption of the Pregnancy Discrimination Act, that premise will necessarily lead to different results in different circuits.

(3) The Ninth Circuit decision in *Pallas* also concluded that the practices at issue here violate ERISA. "Discrimination constitutes a fiduciary breach for purposes of ERISA." 940 F. 2d at 1327. The Seventh Circuit below reached the opposite conclusion, holding that those practices were permissible under ERISA. App. 17a-19a.

The Tenth Circuit has taken an intermediate position, in an unreported decision regarding the applicability of ERISA to practices similar to those in the instant case. *Redding v. AT&T Corp.*, 124 F. 3d 217, 1997 WL 537882 (10th Cir. 1997). *Redding* held that a plaintiff could establish a claim under ERISA if she could show that plan officials had discretion to give her full credit for the period of her pregnancy leave. The Tenth Circuit concluded that the plaintiff in *Redding* had failed to adduce specific allegations that such discretion existed under the plan

in that case. 1997 WL 537882 *4. By contrast, the Ninth Circuit in *Pallas* held that the practice in *Redding* is a per se violation of ERISA.

(4) The conflict between *Pallas* and the decision below is part of a wider disagreement among the lower courts about which practices are governed by this Court's decision in *Bazemore*, and which by the Court's opinion in *Evans*. *Compare Carter v. West Publishing*, 225 F. 3d 1258, 1264-65 (11th Cir. 2000)(*Evans* not *Bazemore* applies to, and bars, claims that female employees were paid less in dividends from stock options) *with Anderson v. Zubieta*, 180 F. 3d 329, 335-36 (D.C.Cir. 1999)(claims regarding differences in housing, travel and vacation benefits "fall on the *Bazemore* rather than *Evans* side of the line") *and Ashley v. Boyles Famous Corned Beef*, 66 F. 3d 164 (8th Cir. 1995) (work assignment claims barred by *Evans*, but wage discrimination claims actionable under *Bazemore*).

The district court below understood that the practices in this case would be unlawful in the Second Circuit. App. 35a (declining to follow the decision in *Pollis v. New School for Social Research*, 132 F. 3d 115 (2d Cir. 1997), on the ground that it was "unpersuasive.") In *Pollis* and in *Acha v. Beame*, 570 F. 2d 57, 65 (2d Cir. 1978), the Second Circuit held that a discriminatory denial of seniority credit which had first occurred outside the relevant limitations period remained actionable, stressing that "a discriminatory policy that results in a wrongful denial of seniority causes harm not so much at the moment of denial as in the future." *Pollis*, 132 F. 3d at 118. Under the decisions in *Pollis* and *Acha*, the practices at issue in the instant case would be illegal in the Second Circuit.

Most recently in *Mullins v. Crowell*, 228 F. 3d 1305 (11th Cir. 2000), the Eleventh Circuit held that the utilization of a facially discriminatory seniority classification rule could be challenged years later when that earlier decision was invoked to lay off the plaintiffs. The plaintiffs there had been assigned to a

special undesirable seniority classification for workers with physical disabilities. The defendant in *Mullins* insisted that the plaintiffs could only complain at the time that that assignment was first made; it reasoned, like the Seventh Circuit below, that the victims of such discrimination could not object if the employer later invoked that earlier classification to lay off the plaintiffs. The Eleventh Circuit rejected that contention, holding that if the original classification was facially discriminatory, a subsequent employment action relying on that classification could be challenged at any time.

> [T]he use of the classification system to rif the plaintiffs gave effect to the discriminatory classifications and started the running of the limitations period. . . .

228 F. 3d at 1311-12.

On the other hand, the Sixth Circuit, relying on *Evans*, has held that if an employer engages in intentional discrimination in placing employees on a ranked promotion list, the limitations period begins to run as soon as the list is created. On this view, *Evans* precludes legal action if it was not commenced until the victims were actually denied promotions. *Cox v. City of Memphis*, 230 F. 3d 199 (6th Cir. 2000). The Sixth Circuit in *Cox* expressly acknowledged that the Second Circuit rejects this interpretation of Title VII. *Guardians Ass'n of New York City Police Dept. v. Civil Service Comm'n of City of New York*, 633 F. 2d 232, 247-48 (2d Cir. 1980).

(5) In 1992 this Court had occasion to consider whether to address these issues when certiorari was sought in *Pallas*. 502 U.S. 1050 (1992). At that time a number of employer organizations submitted amicus briefs emphasizing the practical importance of a definitive resolution of the issue of whether women could be paid reduced retirement benefits because of

pre-PDA pregnancy leave policies.[23] But the respondent in *Pallas* correctly noted that at that juncture there was no conflict among the circuits, and predicted—in retrospect incorrectly—that the adoption of the 1991 Civil Rights Act would end further efforts by employers to discriminate in this manner.[24] Eight years later, that conflict is open and notorious, the application of pre-PDA policies to calculate and limit retirement benefits continues, and an increasing number of women with pre-PDA pregnancies are now on the verge of retirement.

III. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF THIS COURT

As the Ninth Circuit correctly recognized in *Pallas*, the practices in the instant case—and thus the decision below—are inconsistent with this Court's decision in *Bazemore*. The Seventh Circuit acknowledged that, as of the effective date of the PDA, women had less credited service than men solely because they had been on pregnancy leave. It reasoned that there was no post-PDA violation because after 1979 Ameritech had added to the seniority of male and female workers in a non-discriminatory manner. App. 12a-16a. That was precisely the reasoning relied on by the Fourth Circuit, and rejected by this Court, in *Bazemore*. *Bazemore v. Friday*, 751 F. 2d 662, 670 (4th Cir. 1984). The employer in *Bazemore* had, in the years following the enactment of Title VII, afforded raises to black and white workers in a non-discriminatory manner; their pre-Title VII base pay, however, was the result of intentional pre-Act discrimination. That arrangement, this Court concluded, was "a mere continuation of the pre-1965 discriminatory pay

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[23] Brief *Amicus Curiae* of the California Employment Law Council, No. 91-812, pp. 8-9, 17; Brief *Amicus Curiae* of the Equal Employment Advisory Council, pp. 13-15, No. 91-812.

[24] Respondents' Brief in Opposition to Petition for Writ of Certiorari, pp. 8-11, No. 91-812.

structure." 478 U.S. 397 n. 6. The employer was "under an obligation to eradicate salary disparities based on race that began prior to the effective date of Title VII." 478 U.S. at 397. In the instant case, Ameritech was under a similar obligation to eradicate, rather than continue, service credit disparities that derived from pre-PDA discrimination.

The circumstances of this case are clearly controlled by *Bazemore* rather than *Evans*. In *Evans* the female plaintiff was similarly situated to male comparators. The employer dealt in the same manner with every employee who had been fired and later rehired; all of them lost accrued seniority. Here the opposite is the case; Ameritech does not treat in the same manner all employees who were absent for work because of a disability. All men who were absent due to disability continued to accrue service credit, but women on pregnancy leave received no credit after 30 days. It was this disparate treatment that was applied by Ameritech to determine pension checks in the 1990's.

In *Bazemore*, current paychecks were based on old policies; here, current pension payments (or the denial of such benefits) are based on old policies. If in 1975 Ameritech had penalized pregnant women by cutting their wages in half, that decision would necessarily have reduced their pensions as well; as in *Bazemore*, every reduced pension check, like every reduced paycheck, would be a new violation. In the instant case, Ameritech's discrimination affects pension checks, not paychecks, but that is not a difference of legal significance. Ameritech's practice is simply *Bazemore* in slow motion.

The pivotal premise of the opinion below was that *all* forms of discrimination based on pregnancy were lawful before the 1978 enactment of the Pregnancy Discrimination Act. The court stated: "[P]rior to the adoption of the PDA an authoritative Supreme Court decision had held that Title VII did not prohibit distinctions based on pregnancy. *General Electric Co.*

v. Gilbert, 423 U.S. 822 (1976)." App. 15a. But only a year after *Gilbert*, and before the adoption of the PDA, this Court in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), held that some distinctions based on pregnancy were indeed unlawful under Title VII. In *Satty* the employer generally permitted workers to maintain their accrued seniority during a leave caused by disability, but denied accumulated seniority to women who returned from pregnancy leaves. Because that policy had a palpable discriminatory effect on female workers, this Court held unanimously that it was illegal under Title VII. In the instant case, the reutilization of Ameritech's pre-PDA pregnancy leave policies to deny or reduce current benefits clearly discriminates against female workers, a fact which the company has never suggested could be justified by business necessity.

The decision below conflicts as well with this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The Seventh Circuit recognized that Title VII does not permit an employer to utilize a seniority rule that involves intentional discrimination. However, it held that a policy is only "facially" discriminatory if the type of discrimination apparent on its face was illegal at the time when the policy was originally adopted. Because the court of appeals believed that Ameritech's pre-PDA pregnancy leave policies were lawful prior to April 1979, it concluded that those policies did not involve "the kind of intentional discrimination that would trigger the exception to the statutory protection afforded to seniority systems." App. 15a. *Teamsters*, however, expressly held that a seniority system is not afforded the protection of section 703(h) of Title VII if, *prior* to the enactment of Title VII, the system was adopted for the purpose of discriminating on the basis of race or sex, even though federal law did not forbid such discrimination at the time. 431 U.S. at 324 (pre-Act system would be unlawful if it "ha[d] its genesis in racial discrimination"); *Patterson v. American Tobacco*, 456 U.S. 63

(1982)(standard for determining legality of pre-Act seniority system same as standard for post-Act system); *Swint v. Pullman-Standard*, 456 U.S. 273 (1982)(seniority system adopted in 1954 unlawful if structured for discriminatory purpose); *California Brewers Assn. v. Bryant*, 444 U.S. 598, 611 (1980)(remanding to afford plaintiff an opportunity to prove seniority system adopted in 1959 was adopted for a discriminatory purpose).

The Seventh Circuit also insisted that an ongoing illegal practice only constitutes a "continuing violation" if the victims "had no way of knowing that something bad had happened to them until much later." App. 15a. Since women knew in 1979 that their net credited service had not been corrected in the wake of the PDA, the court below reasoned, the continued utilization of that discriminatory calculation became legal when the victims failed to complain immediately about that ongoing violation once the PDA became law. This holding too is inconsistent with *Bazemore v. Friday*. The black employees in *Bazemore* also knew full well that the discriminatory pre-Title VII salary structure had never been corrected. This Court rejected the employer's contention that its discriminatory wage practices had somehow acquired immunity from challenge because of its prolonged application; "[t]o hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks." 478 U.S. at 385. This Court has repeatedly permitted plaintiffs to challenge the legality of employment practices whose discriminatory nature had been known for years. *See e.g. Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). The holding in *Lorance v. AT&T Technologies*, 490 U.S. 900, 912 (1989) that a facially discriminatory seniority system "can be challenged at any time" is clearly inconsistent with the Seventh Circuit's holding that the very fact that a discriminatory nature of a practice is express, and thus

apparent to its victims, precludes legal challenge at any time other than the moment when the practice first becomes unlawful.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-3096, 98-3101, 98-3102

AMERITECH BENEFIT PLAN COMMITTEE, *et al.*,
Plaintiffs-Appellees,

v.

COMMUNICATION WORKERS OF AMERICA,
ANNETTE FOSTER-HALL, *et al.*,
Defendants-Appellants.

and BERNADETTE BERNABEI,
Plaintiff-Appellant,

v.

AMERITECH CORPORATION, *et al.*,
Defendants-Appellees.

February 9, 1999, Argued
July 13, 2000, Decided

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 97-C-1441, 97-C-2209. Suzanne B. Conlon, Judge.

Before CUDAHY, RIPPLE, and DIANE P. WOOD, *Circuit Judges*.

OPINION OF THE COURT OF APPEALS

DIANE P. WOOD, *Circuit Judge*. This case is about the present consequences of the way in which Ameritech Corporation (and its predecessors) computed time for purposes of its pension plan, early retirement, and similar benefits, when the reason for an approved absence from work

was pregnancy rather than any other short-term disability. (For the sake of convenience, we refer throughout to the company as Ameritech, even though Ameritech did not come into being until 1984. The difference in corporate identity makes no difference to the outcome of this case.) After the passage of the Pregnancy Discrimination Act (the PDA) in 1979, Pub. L. No. 95-555, codified at *42 U.S.C. § 2000e(k)*, the Ameritech Benefit Plan Committee (benefit committee) did not go back to recompute leave periods for women employees whose absences were because of pregnancy.

This decision took on immediate importance for the affected employees in 1994, when Ameritech added benefits to its pension plan. For these people, indeed, it made the difference between eligibility to take early retirement and to enjoy other pension benefits, and lack of eligibility. In an unusual move, Ameritech jumped into court with an action for a declaratory judgment, and it attempted to sue a defendant class of employees. The district court granted summary judgment for Ameritech, dismissing the class claims under Title VII, ERISA, the Equal Pay Act, and various state laws. We affirm.

I

For the entire time period relevant to this suit, Ameritech has used a record-keeping system it calls Net Credited Service (NCS) for purposes of determining an employee's entitlement to pension and other employment benefits. The NCS system produces a number, created by Ameritech and assigned to each employee, which reflects an adjusted amount of "continuous" employment with which the employee is credited. Each employee's NCS number is based on several factors, including credit that Ameritech gives the employee for time spent working at Ameritech, and credit that it gives the employee for various leaves of absence. In other words, employees receive service credit for actual time worked and for certain leaves, but they do not receive service credit for

other leaves. The latter time periods are "squeezed out" or subtracted from the gross time between hire date and the present, before benefit eligibility is determined. Ameritech notes, without contradiction from the employees, that the NCS system is incorporated in both its collective bargaining agreements and in its pension plans.

The addition of the PDA to Title VII, effective April 29, 1979, forced Ameritech to change its method of calculating NCS. For most of the time prior to the advent of the PDA, Ameritech had counted only a maximum of 30 days of an employee's pregnancy or maternity leave towards her NCS (because it was treating pregnancy as a "personal leave" capped by a 30-day limit, instead of as a disability leave). Pregnancy leaves in those days typically lasted much more than 30 days, at Ameritech's insistence: Ameritech required pregnant women to begin their pregnancy leaves several months before their due dates. In contrast, employees with other disabilities were granted full NCS credit for their disability-related leaves. The PDA, which established that discrimination based on pregnancy is sex discrimination and that pregnancy must be treated the same as any other short-term disability, made it clear to Ameritech that its NCS system had to change. Ameritech accordingly began giving employees full NCS credit for their pregnancy and maternity leaves. It did not, however, adjust the NCS periods of employees who had taken pregnancy or maternity leaves before the effective date of the PDA, April 29, 1979, nor did it discontinue its use of NCS to calculate various employee benefits.

Here matters stood for many years. The stakes for the women who had received only partial credit for their pre-PDA pregnancy leaves became higher in 1994, however, which led to the present litigation. On March 7 of that year, Ameritech amended its pension plan to provide early retirement benefits to some employees. Under the

amendments, eligible non-management employees who retired between February 22, 1994, and September 30, 1995 were entitled to have three years added to their terms of employment and three years added to their actual ages for purposes of determining retirement eligibility and calculating the amount of their pension benefits. The same employees were made eligible for additional tuition assistance, as well as cash payments under a Supplemental Income Protection Program. Ameritech's plan administrators used the NCS in calculating each employee's term of employment in order to distribute the benefits. Because employees who had taken pregnancy or maternity leaves prior to April 29, 1979 had lower NCS numbers than they would have had under a system that did not discriminate against pregnancy, some of them did not receive the added 1994 benefits even though they would have been eligible if they had been disabled in any other way.

Cheryl Cuprys and Bernadette Bernabei were two Ameritech employees who had taken pre-April 29, 1979 pregnancy and maternity leaves and were therefore not eligible for the 1994 benefits. Cuprys and Bernabei both challenged their denial of benefits, but Ameritech's benefit committee denied their claims and appeals. Cuprys and Bernabei then turned to the EEOC and filed charges with it. The EEOC issued a right to sue letter to Cuprys on February 24, 1995, and to Bernabei on September 28, 1995.

On December 20, 1995, Bernabei filed suit in the United States District Court for the Northern District of Ohio alleging that Ameritech's actions violated Title VII, the Equal Pay Act, ERISA, and state law (*Bernabei v. Ameritech Corp., et al., 1998 U.S. Dist. LEXIS 11363*, No. 97-CV-02209). On March 3, 1997, Ameritech filed suit against a claimed defendant class of affected women and against two unions, the Communications Workers of America, AFL-CIO (the CWA) and certain local unions affiliated with the

International Brotherhood of Electrical Workers (IBEW), in the Northern District of Illinois. Ameritech's complaint asked for a declaratory judgment that it had not violated any of the same laws invoked in the *Bernabei* action. Bernabei's suit was transferred to Illinois, and in May of 1997 it was consolidated with Ameritech's declaratory judgment action.

The putative defendant class and the CWA filed their answers, along with counterclaims under Title VII, the Equal Pay Act, ERISA, and the state laws. (Indeed, these claims mirrored Ameritech's request for declaratory relief, which saves this case from undue complication as we explain below.) In an order dated August 28, 1997, the district court approved the parties' joint request for class certification as to the Title VII, ERISA, and state law claims, apparently under Fed. R. Civ. P. 23(b)(1) and 23(b)(2). (The order contains no discussion or explanation of this decision, but these are the rules cited in the earlier motion for certification.) Later, the district court granted Ameritech's summary judgment motion as to all parties, and denied the cross-motions of the CWA, the class, and Bernabei. This appeal followed.

II

A. Subject Matter Jurisdiction

The EEOC, through a brief *amicus curiae* it has filed with this court, argues that the district court lacked subject matter jurisdiction over Ameritech's Title VII and Equal Pay Act claims, because neither statute provides for suits by the employer against whom discrimination is alleged. Given the fundamental nature of this argument, we address it first. In our view, the district court had subject matter jurisdiction under *28 U.S.C. § 1331*. It is of course true that the Declaratory Judgment Act, *28 U.S.C. § 2201*, is not an independent source of subject matter jurisdiction. See *GNB Battery Technologies, Inc. v. Gould, Inc., 65 F.3d 615, 619 (7th Cir. 1995); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667,*

671, 94 L. Ed. 1194, 70 S. Ct. 876 (1950). It allows suits for declaratory judgment where federal jurisdiction would exist in a coercive suit brought by the declaratory judgment defendant. *See GNB Battery Technologies, Inc., 65 F.3d at 619; Franchise Tax Board, 463 U.S. 1, 19, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983).* Had the aggrieved employees (here, class defendants) brought a suit to enforce Title VII and the Equal Pay Act against Ameritech, the district court would have had jurisdiction over the complaint because interpretation and application of these statutes present federal questions. *See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).* Indeed, this is exactly what the employees did when they filed their counterclaims. One way or the other, the claims on all sides present federal questions, and so our jurisdiction is secure.

The Commission is really arguing that the statutes confer no right on Ameritech to sue as a plaintiff, because they confer no such rights on employers (*i.e.* no claim can be stated) or because it is the wrong party (*i.e.* it lacks statutory standing). While these could be important points, they do not implicate the jurisdiction of the district court. Our basis for jurisdiction comes from the underlying controversy, not the particular party initiating suit. We note, however, that the question whether an employer should have the right to short circuit the EEOC's internal processes by running to court and filing a declaratory judgment action in a Title VII suit is an important one, which will have to be addressed in a case that raises it properly. The counterclaims and Bernabei's direct action mean that this is not such a case, however, so we leave further discussion of this point to another day.

B. Ripeness of Ameritech Action

The EEOC argues in the alternative that Ameritech's suit was unripe because the parties failed to exhaust their administrative remedies. At the time Ameritech filed its

action, individual charges were still pending before the EEOC's Cleveland office, that office had not completed its consideration of the charges, yet Ameritech named some of those people as defendants. Shortly after Ameritech filed this action, the Commission filed its own suit in the Northern District of Ohio, naming Ameritech, the IBEW, and the CWA as the defendants and asserting claims similar to those that are here. Although Bernabei's suit was transferred to the Northern District of Illinois from the same Ohio district court, that court denied Ameritech's motion to transfer the EEOC case here, and so the Commission's action is still pending there, awaiting the outcome of this appeal.

Had Ameritech not filed its declaratory judgment action, the Commission could have controlled both the timing and the forum of this litigation to a far greater degree. (We note, however, that the Commission is not immune from a transfer of venue under *28 U.S.C. § 1404(a)*, and so this right is not unqualified.) The Commission argues that the employer should not have the right to thwart its enforcement decisions in the way that Ameritech has done here. In a sense, its argument is that any employer action that is possible (assuming *arguendo* that such actions exist) must be subject to the same exhaustion requirements that employees face. This too is a reasonable argument, but not one that can carry the day on the facts before us. To begin with, exhaustion is not a jurisdictional requirement for Title VII claims. See *Gibson v. West, 201 F.3d 990, 994 (7th Cir. 2000)*. It is merely a precondition to bringing a Title VII claim in federal court, and is therefore subject to the doctrines of waiver, estoppel, and equitable tolling. *See id.*

We would have a much more difficult case on our hands if Bernabei and Cuprys had never filed charges with the EEOC, or if the EEOC had not responded to the charges by issuing right-to-sue letters. We do not need to address that hypothetical situation here, however, nor is it necessary for us

to address the question whether an employer must file a formal charge with the Commission as a prerequisite to bringing the kind of declaratory judgment action Ameritech filed. In our case, individual charges were filed and the EEOC issued right-to-sue letters. Thus, whatever interests in completion of the Commission's internal procedures may exist were satisfied. We are left with the more conventional problem of competing lawsuits on the same issues in two different federal districts. This does not seem to have bothered the parties much, and it is surely not the kind of fundamental defect that divests the district court of power to rule on the case.

C. Class Certification

Despite the fact that neither party has addressed the way that class certification was accomplished in this case, we cannot proceed without considering this problem as well. This is so precisely because classes include not only the parties directly before the court, but absentees, and in some cases the active participants may sell out the interests of the others. *See, e.g., Crawford v. Equifax Payment Services, Inc., 201 F.3d 877, 882 (7th Cir. 2000); see Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169 (5th Cir. 1978); Plummer v. Chemical Bank, 668 F.2d 654, 658 (2d Cir. 1982).* We look at the alleged defendant class that the district court certified for Ameritech's declaratory judgment under Title VII.

To begin with, there is a potential problem with virtually all defendant classes that proceed under anything but Rule 23(b)(3). Defendant classes, initiated by those opposed to the interests of the class, are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives, which means they are more in need of the due process protections afforded by (b)(3)'s safeguards. It also means that they are less likely to satisfy the requirements of Rule 23(a). Risks of diverging interests are particularly

high in actions seeking monetary remedies. In *Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985)*, the Supreme Court discussed the analogous problem of the rights of absentee members of a plaintiff class that sought monetary relief. The Court concluded that nothing less than the type of notice and opt-out opportunity provided by Rule 23(c) (or, in *Shutts*, the Kansas equivalent to the federal rule) would satisfy due process. Moreover, throughout its discussion, it frequently drew comparisons between the position of absentee plaintiff class members and defendants, and virtually every one of those comparisons implied that defendants have, if anything, greater rights. We are not aware of a single case that has ever justified a monetary award (or, as here, a judgment declaring that a party is entitled to no money) without at a minimum requiring notice be afforded to that party.

Our decision in *Henson v. East Lincoln Township, 814 F.2d 410 (7th Cir. 1987), cert. granted, 484 U.S. 923 (1987), cert. dismissed, 506 U.S. 1042 (1993)*, holds that a defendant class is normally impermissible under Rule 23(b)(2), although it leaves open the possibility of a debtor's bringing a class action against a class of creditors seeking a declaration of nonliability. This is what Ameritech says it has done, but later developments in this circuit's class action jurisprudence make it clear that the district court should not have brushed over the requirements of Rule 23 so quickly. We refer to the decision in *Jefferson v. Ingersoll Intern. Inc., 195 F.3d 894 (7th Cir. 1999)*, in which we made clear that mixed class actions that seek both equitable and compensatory relief must satisfy the formalities of Rule 23(b)(3). See also *Lemon v. Intern. Union of Operating Eng'rs, Local No. 139, 2000 U.S. App. LEXIS 12722, 2000 WL 733577*, No. 99-4101 (7th Cir., June 9, 2000). As for this, some blame lies at the feet of the class representatives. Paragraph 1 of the counterclaim begins by saying "this counterclaim seeks money damages, declaratory and injunctive relief against Plaintiffs for violations of Title

VII, . . . ERISA, . . . the Equal Pay Act, . . . [and certain state laws]." What could be clearer? And yet the record is devoid of any indication that the absentees had any idea that the case was going on.

The parties did not ask for class certification for purposes of the Equal Pay Act claims, because they recognized that the problems with certifying such a class under the Equal Pay Act are especially great. There is no such thing as a Rule 23 class action in an Equal Pay Act case. The Act, by incorporating the requirements of the Fair Labor Standards Act, compels the use of a more restrictive "opt-in" procedure. *29 U.S.C. § 216(b).* Nothing of the sort occurred here, once again because neither the district court nor the parties paid appropriate attention to the certification question.

The problem with ignoring these issues is that the rights of persons not before the court are necessarily implicated once a class is certified. We have concluded that the proper way to proceed is to decide the claims of the parties who are clearly before the court: the named plaintiffs and anyone who intervened formally.[1] In fact, our resolution of these claims will have a powerful *stare decisis* effect on the claims absentees might have wanted to assert, but that cannot be

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[1]These plaintiffs include (aside from the unions) Bernadette Bernabei, the original named individual defendants in Ameritech's declaratory judgment suit (Annette Foster-Hall, Brenda Gibson, Wilbur Haynes, Helen Kloess, H. Carleen Leach, Sharon Parrish, Frances Timmerman, Phyllis Barnes, Betty Bober, Janet Champer, Linda Croddy, Patricia Elick, Lesle Gardner, Dolores Harmacinski, Polly Neimeier, Debby Flynn Adomaitis, Anne Marie Allen, Carol Amato, Vicki Andrews, Evelyn Dallos, Leanne Grover, Ruth Johnson, Virginia Jones, Francie Wingo, Sara Sue Adkins, Debra Anderson, Janet Appleton, Sandra Ballard, Kathryn Kreger, Margaret Perrill, Diane Richard, Brenda Smitherman-Muir, Mary Jo Avery, Diana Beattie, Christine Berger, and Shirley Connell), and those individuals whom the district court allowed to intervene (see Agreed Amended Motion to Intervene Certain Class Members, Exhibit A).

helped. By the same token, our ruling in this action will not formally preclude the EEOC in its Ohio action, since the Commission is also not a party before this court. The Ohio court, and the Sixth Circuit in turn should an appeal be taken, will have the right to come to their own conclusions on these issues.

D. The Unions

As the litigation progressed, only the CWA played an active role in filing papers with the court. Our comments, however, apply in principle to both unions. Apart from their potential role as an organizational representation of their members, the unions had little to say here. Indeed, because the way in which time of service was computed implicates the collective bargaining agreements the unions had with Ameritech, they might have some incentive to defend their earlier actions. For the same reason we have disregarded the role of the absentee class members, we do not reach the legal issues that might be raised in conjunction with the unions' role. Neither party briefed these questions, and it suffices to say here that the unions' participation does not change our view of the merits of the action.

III

We turn, finally, to the merits. Because this appeal comes to us from a grant of summary judgment, we review the decision of the district court *de novo*. See *Vakharia v. Swedish Covenant Hosp., 190 F.3d 799, 805 (7th Cir. 1999)*. We construe the record in the light most favorable to the employees, who are entitled as the non-moving parties to a reversal if the record reveals a genuine issue of material fact. See *id.*

A. Title VII

As we have already noted, Title VII prohibits an employer from discriminating against an employee or applicant based

on sex, *42 U.S.C. § 2000e-2(a)*, and the PDA provides that for purposes of Title VII discrimination based on sex includes discrimination based on pregnancy. *42 U.S.C. § 2000e(k)*. In light of those indisputable facts, Ameritech freely admits that it could not *today* calculate its NCS numbers to favor persons who had not taken pregnancy or maternity leave, or in a way that imposed some form of discount on that one type of short-term disability, and then apply those numbers to determine employee benefits. Its point is a different one: it urges that it is too late for the employees to complain about a method of calculation of NCS that applied only to pre-PDA leaves and that has not been in existence at Ameritech since 1979. A Title VII charge must be filed within 180 days after the "alleged unlawful employment practice occurred," unless the plaintiff initially filed charges with an appropriate State or local agency, in which case the charge must be filed within 300 days after the "alleged unlawful employment practice," or within 30 days after receiving notice that the State or local agency has terminated the proceedings—whichever is earlier. *42 U.S.C. § 2000e-5(e)(1)*.

The outcome of this case turns on which of two competing lines of authority provide a better "fit" here. The one on which the employees rely is represented by *Bazemore v. Friday, 478 U.S. 385, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986)*. In *Bazemore*, the Court found that an employer's calculation of a discriminatory base salary structure prior to the effective date of Title VII did not leave the employer free to use that tainted base salary structure in determining salaries after Title VII's effective date. *Id.* at 395-96. See also *Wagner v. Nutrasweet Company, 95 F.3d 527, 534 (7th Cir. 1996)*. Just so here, they say: Ameritech may not use a system for calculating time of service that was tainted by pregnancy discrimination when it makes present decisions about eligibility for benefits.

Intoning the words "*bona fide* seniority system" does not help Ameritech, in the employees' view, because the Civil Rights Act of 1991 amended *42 U.S.C. §2000e-5(e)* to provide that "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for a discriminatory purpose in violation of this title, . . . when a person aggrieved is injured by the application of the seniority system or provision of the system." The employees conclude that Ameritech's continued use of pre-1979 NCS computations is a fresh violation of the statute, which occurred in 1994. It was then that Ameritech afforded early retirement and various cash benefits to employees who had high enough NCS numbers to retire between February 22, 1994 and September 30, 1995. The company could have decided to give its new benefits to all of its employees based on how long they had worked for Ameritech, and it could have calculated that length of time such that all employees who had been disabled prior to April of 1979 were treated alike. Instead, in applying the 1994 benefits, it decided to hinge them on "NCS," thereby favoring those employees who had not been pregnant prior to April of 1979.

Ameritech (naturally) relies on the other line of cases, represented by *United Air Lines v. Evans, 431 U.S. 553, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977)*, and *Delaware State College v. Ricks, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980)*. In *Evans*, the employer's discriminatory action occurred when it forced a female flight attendant to quit because she got married. *431 U.S. at 554-55*. Later, the employer rehired the flight attendant. The *Evans* Court held that the employer's refusal after the rehiring to "correct" the effects of the past firing by affording her additional seniority did not violate Title VII, because such a refusal was not a discriminatory action in itself. *Id. at 557-58*. Both male and female employees who had been fired (whether for a non-discriminatory reason or for an unchallenged discriminatory reason) and then re-hired were treated the same for purposes

of seniority credit. The continuing impact of the earlier action, within the context of an otherwise neutral system, was not enough to show a present violation. *Ricks* is similar. There, the College's discriminatory act occurred when it denied plaintiff Ricks academic tenure, allegedly on the basis of his national origin. *449 U.S. at 252.* The college fired Ricks a year later, as it fired other academic employees at the expiration of their terminal 1-year contracts. The Court concluded that there was no continuing violation, and that Ricks' claim accrued at the time of the tenure denial. *Id. at 257-58.*

For a number of reasons, we think that Ameritech has the better of this dispute, though we acknowledge hat the line between continuing violations that arise with each new use of the discriminatory act (*e.g.*, the *Bazemore* paychecks) and past violations with present effects (*e.g.*, the *Evans* seniority) is subtle at best. But it is a line the Supreme Court has drawn, and it is our obligation to apply it if at all possible. First is the fact, simplistic as it may seem, that our case involves computation of time in service—seniority by another name—followed by a neutral application of a benefit package to all employees with the same amount of time. That suggests that we should look first to *Evans,* and follow the other line only if there is no alternative. It is true that *Bazemore* was decided nine years after *Evans,* but the *Bazemore* Court said nothing about overruling *Evans,* and so we assume that it did not do so.

The statute itself offers good reason to treat seniority systems with special care, because it specifically exempts discriminatory effects that flow from *bona fide* seniority systems from the definition of unlawful employment practices, as long as the differences are not the result of an intention to discriminate. *42 U.S.C. § 2000e-2(h).* If the employees are able to show intentional discrimination, their action accrues at the time they are injured by the seniority

system—that is, when they are denied benefits. *42 U.S.C. § 2000e-5(e).*

In our opinion, these employees cannot show the kind of intentional discrimination that would trigger the exception to the statutory protection afforded to seniority systems. As Ameritech points out, prior to the adoption of the PDA an authoritative Supreme Court decision had held that Title VII did not prohibit distinctions based on pregnancy. *General Electric Co. v. Gilbert, 429 U.S. 125, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976).* Moreover, the PDA has not been treated as a retroactive statute, see *Condit v. United Air Lines Inc., 631 F.2d 1136, 1139-40 (4th Cir. 1980); Schwabenbauer v. Board of Ed. of City Sch. Dist. of City of Olean, 667 F.2d 305, 310 n. 7 (2d Cir. 1981); Whitehead v. Oklahoma Gas & Elec. Co., 187 F.3d 1184, 1193 (10th Cir. 1999),* and so Ameritech would have had no reason to think it had to reshuffle its NCS list after the Act was passed. Third, the Supreme Court has held that the fact that a seniority system perpetuates pre-Act discrimination does not preclude it from being *bona fide. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 352-53, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977).* The employees here protest that they are not talking about a seniority system, but they are wrong. Under the Supreme Court's test in *California Brewers Ass'n v. Bryant, 444 U.S. 598, 606, 63 L. Ed. 2d 55, 100 S. Ct. 814 (1980),* the key to deciding whether a decision-making process qualifies as a seniority system is its reliance on relative lengths of employment. That is what Ameritech's NCS system does, and we think it fits easily into the seniority system line of cases.

Last, this is not a case like some continuing violations where the employees had no way of knowing that something bad had happened to them until much later. Hostile environment sexual harassment cases, for example, can only be brought once it becomes clear that the harassment is severe or pervasive enough to constitute an adverse effect on terms

and conditions of employment. Here, the women knew the minute they took their pregnancy or maternity leaves that they were not getting full credit for their time off. No later than the time when Ameritech amended its plan in response to the PDA, they knew that their NCS had not been amended. It is no secret to any employee that seniority rolls like Ameritech's NCS make a difference for a host of employee benefits, some present, and some future. Ameritech informed each employee periodically of his or her accrued NCS. The time for bringing a complaint was therefore long ago, and the district court correctly recognized that these employees had sued too late.

B. The Equal Pay Act

The employees next challenge Ameritech's procedures under the Equal Pay Act. (As before, we are addressing only the claims of the named plaintiffs and anyone who properly intervened before the district court.) We assume for the sake of argument that the employees have satisfied their initial burden under the statute to show that Ameritech pays women less than men for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *29 U.S.C. § 206(d)(1)*; see *Corning Glass Works v. Brennan, 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974)*. On the record here, the only difference between the complaining employees and their colleagues who were able to receive the 1994 benefits is that they were pregnant women before April of 1979.

But once again, the fact that the disadvantage from which they suffer is the result of a *bona fide* seniority system dooms their claim. The Equal Pay Act provides that there is no violation if the unequal pay was due to "any other factor other than sex," including "(i) a seniority system; (ii) a merit system; [or] (iii) a system which measures earnings by quantity or quality of production." *29 U.S.C. § 206(d)(1)*.

This is an affirmative defense for the employer, *see Corning Glass Works, 417 U.S. at 196*, but for the same reasons we have just reviewed for purposes of Title VII, we find that Ameritech has met its burden. In addition, we agree with Ameritech that the Equal Pay Act claim is untimely. Claims arising under that statute must be filed within two years of their accrual, *29 U.S.C. § 255(a)*, and these claims were not presented until many years after the initial decision not to adjust the employees' time in service for pre-1979 pregnancy leaves.

C. ERISA

The employees' final federal claims involve ERISA. First, they believe that Ameritech violated its duty under ERISA to act in the best interest of all the plan beneficiaries and participants when it discriminated against certain female beneficiaries of the plan. ERISA fiduciaries are required to act with care and skill "solely in the interest of the participants and beneficiaries." *29 U.S.C. § 1104(a)*. Ameritech is a fiduciary under ERISA, because it has discretion and control in implementing the plan. See *29 U.S.C. § 1002(21)(A); Administrative Committee v. Gauf, 188 F.3d 767, 770 (7th Cir. 1999)*. Second, the employees argue that Ameritech violated section 510 of ERISA, which prohibits employers from frustrating their employees' attainment or enjoyment of benefit rights. *29 U.S.C. § 1140;* see *Feldman v. American Memorial Life Ins. Co., 196 F.3d 783, 792 (7th Cir. 1999)*. Individuals may bring claims to recover benefits, to enforce rights, and to clarify rights under *29 U.S.C. § 1132(a)(1)(B)*.

Even if we agreed that the employees' ERISA claims were timely, perhaps because they arise more directly out of the 1994 plan amendment than the Title VII or Equal Pay Act claims, the ERISA claims face an additional hurdle. In order for the employees to show that Ameritech breached either a fiduciary duty or section 510, the employees must be able to

show that they were, at some time, eligible for the plan's benefits. Fiduciaries are required to act "in accordance with the documents and instruments governing the plan." *29 U.S.C. § 1104*. Any breach of the fiduciary duty must derive from Ameritech's implementation of the plan. For its part, section 510 only applies if the employees can show (among other things) that they were qualified under the plan for the denied benefits. See *Feldman, 196 F.3d at 792*. If the plan itself provides for discriminatory practices, such that they do not qualify for benefits under its terms, they cannot prevail on an ERISA claim.

The employees stress that the plan refers to "TOE," or "time of employment," and not NCS. They maintain that TOE does not necessarily need to be calculated using NCS, and that they would be eligible for the benefits of the plan if their time of employment was calculated in the same way as it would be for other previously disabled employees. Nevertheless, Ameritech's decision to use NCS to calculate time of employment cannot evidence an intent to discriminate if the NCS system itself has passed muster under the antidiscrimination laws.

Furthermore, there may be a problem with shoe-horning a discrimination claim into the ERISA notion of fiduciary duty, because ERISA "does not itself proscribe discrimination in the provision of employee benefits." *Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983)*. *Shaw* found that a state law prohibiting discrimination was preempted by ERISA, because it "related to" the area of benefits, which is covered by ERISA. *Id. at 99*. Ameritech argues that the *Shaw* Court also insinuated that ERISA would not be a source of protection against such discrimination. The Court said that discriminatory practices would have to be evaluated under Title VII, rather than a broad state law, and did not specifically include the option of resorting to ERISA. *Id. at 105-06*. But the Shaw Court was not presented with and

did not answer the question of whether discrimination against certain plan participants could ever reach the point of breaching fiduciary duties. We have no need to decide whether such a claim might be stated in some future case; we conclude only that this is not such a case.

ERISA's fiduciary duty was meant to hold plan administrators to a duty of loyalty akin to that of a common-law trustee. See John Langbein, *"The Supreme Court Flunks Trusts," 1990 Sup. Ct. Rev. 207, 210-11.* A common-law trustee was not allowed to favor one class of beneficiaries over another. Restatement of Trusts § 183. A plan administrator's duty to act in the best interest of all the beneficiaries cannot mean that it must cater to the optimal needs of each individual beneficiary. All of the beneficiaries' interests will not always be aligned. The fiduciary must act as though it were a reasonably prudent business person with the interests of all the beneficiaries at heart. The question is whether such a businessperson, facing potential risks of future litigation as well as possible employee disenchantment with the plan, would have chosen to adhere to the NCS system, with the consequent effect of denying the 1994 benefits to the women affected here. See *29 U.S.C. § 1104(a)(1)(B).* The answer must be yes, since adherence to the system for *all* participants meant that the company had a reliable seniority list upon which everyone could rely for any appropriate purpose.

IV

The district court's order granting summary judgment also awarded judgment to Ameritech on the state law claims, because they mirrored the federal claims. The appellants have not contested that part of the court's decision on appeal, and so we consider any possible arguments waived.

For the reasons stated, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 97 C 1441, No. 97 C 2209

AMERITECH BENEFIT PLAN COMMITTEE, *et al.*,
Plaintiffs,

v.

ANNETTE FOSTER-HALL, *et al.*,
Defendants.

AND BERNADETTE BERNABEI,
Plaintiff,

v.

AMERITECH CORPORATION, AMERITECH MANAGEMENT PENSION PLAN, AND AMERITECH EMPLOYEES' BENEFIT COMMITTEE,
Defendants.

July 20, 1998, Decided
July 21, 1998, Docketed

MEMORANDUM OPINION AND ORDER

SUZANNE B. CONLON, *United States District Judge.*

Ameritech Benefit Plan Committee, Ameritech Pension Plan, Ameritech Management Pension Plan and Ameritech Corporation and its subsidiaries (collectively "Ameritech") sue 36 present and former employees of Ameritech Corporation, as representatives of approximately 7,000 similarly-situated class members (collectively "the class defendants"); the Communications Workers of America,

AFL-CIO ("CWA"); and the International Brotherhood of Electrical Workers, Local Nos. 165, 188, 336, 383, and 399 ("IBEW"). Ameritech seeks a declaratory judgment that its treatment of service credit for pregnancy or maternity-related leaves taken prior to the effective date of the Pregnancy Discrimination Act (April 29, 1979) does not violate ERISA, Title VII, the Equal Pay Act, or any other federal, state, or local law (Count I). Ameritech also seeks a declaratory judgment that its treatment of service credit does not violate the terms of collective bargaining agreements between Ameritech Corporation and the unions (Count II).

The CWA, the class defendants, and intervening defendant employees (collectively "the employees") filed counterclaims alleging that Ameritech's denial of additional service credit for pre-1979 pregnancy leaves in connection with pension plan enhancement programs offered in 1991 through 1995 violates ERISA and constitutes intentional discrimination based on gender and/or pregnancy in violation of Title VII, the Equal Pay Act and various states' discrimination laws. In a consolidated action (97 C 2209), Bernadette Bernabei sues Ameritech Corporation, Ameritech Management Pension Plan and Ameritech Employees' Benefit Committee for violations of ERISA, Title VII, the Equal Pay Act, and Ohio discrimination law.[1] The parties have filed cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56.

BACKGROUND

The following facts are undisputed. Ameritech Benefit Plan Committee ("ABPC") is a named fiduciary and administrator of Ameritech Pension Plan ("APP") and Ameritech Management Pension Plan ("AMPP") (collectively "the pension plans"). Agreed Joint Stipulations of Fact ("Stip.") 1,

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[1] Bernabei adopts the arguments set forth in the class defendants' memoranda.

¶¶ 1, 2. The pension plans were established and are maintained for the benefit of the participating employees of Ameritech Corporation, its direct and indirect subsidiaries, and Ameritech's predecessors. *Id.* ¶ 31. The benefits provided to eligible employees under the pension plans are determined in part by each employee's term of employment. *Id.* ¶ 34.

April 29, 1979 was the effective date of the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e-(k). Prior to April 29, 1979, Ameritech's predecessors typically granted their female employees a maximum of 30 days service credit for pregnancy or maternity-related leaves of absence. *Id.* ¶ 36. In contrast, Ameritech's predecessors typically granted full service credit for the entire period of other disability-related leaves of absence. *Id.* ¶ 37. Net credited service dates are part of a record-keeping system used by Ameritech and its predecessors to track terms of employment. Rather than aggregate separate periods of service when service is interrupted, employees' hire dates are adjusted to "squeeze out" those periods of absence that are not credited as service. Since the PDA became effective, Ameritech and its predecessors have provided service credit for pregnancy and maternity-related leaves to the same extent as they provide service credit for periods of disability attributable to other conditions. *Id.* ¶ 39. However, Ameritech has not provided additional retroactive service credit for pregnancy or maternity-related leaves taken prior to April 29, 1979. Thus, the employees' net credited service dates continue to reflect the fact they received a maximum of 30 days service credit for pregnancy leaves taken before April 29, 1979.

In 1991, Ameritech amended the AMPP to implement a program known as the 1991 Special Enhancement ("1991 Enhancement"). The 1991 Enhancement provided an additional three years of age and service under the AMPP for certain benefit purposes to eligible management employees

who retired between July 31, 1991 and December 30, 1991. *Id.* ¶ 40. In 1992, Ameritech amended the AMPP to implement a program called the 1992-93 Workforce Resizing Program ("WRP"). The WRP provided enhanced pension benefits for eligible management employees who retired between July 31, 1992 and March 31, 1993. *Id.* ¶ 41.

On March 7, 1994, Ameritech's board of directors authorized an amendment to the APP known as the Ameritech Pension Plan Enhancement Program ("APPEP"). *Id.* ¶ 42. The APPEP provided that eligible non-management employees who retired between February 22, 1994 and September 30, 1995 would have three years added to their terms of employment and three years added to their actual ages for purposes of determining retirement eligibility and calculating the amount of their pension benefits. *Id.* In April 1994, Ameritech announced it would offer the Supplemental Income Protection Program ("SIPP") to certain non-management employees. Employees eligible for SIPP could receive additional payments upon leaving Ameritech, in addition to benefits provided by the APPEP. *Id.* ¶ 45. Payments under SIPP were calculated in part based upon an employee's term of employment. *Id.*

The APPEP, the WRP and the 1991 Enhancement did not change the requirements for retirement eligibility *or* the method of calculating an employee's term of employment. That is, the employees' terms of employment continue to reflect the fact they received a maximum of 30 days service credit for pregnancy leaves taken before April 29, 1979. As a result, even if employees elected to retire under the APPEP, the WRP or the 1991 Enhancement they would have remained ineligible for immediate retirement benefits—where they would have otherwise been immediately eligible for retirement benefits under these programs had they received full service credit for pregnancy leaves taken before April 29, 1979.

Beginning in 1992, employees filed administrative claims under the pension plans seeking additional service credit for pre-1979 pregnancy leaves. These claims were denied and the employees appealed to the Ameritech Benefit Plan Committee. The ABPC determined the claims were properly denied, noting that the pension plans did not contain provisions permitting additional service credit beyond the service credit to which employees were entitled under predecessor plan provisions and company leave policies in effect when the leaves were granted. In 1994, a number of employees filed charges with the Equal Employment Opportunity Commission ("EEOC"), alleging that Ameritech's treatment of service credit for pregnancy leaves taken prior to April 29, 1979 violated Title VII. In May 1997, the EEOC issued right-to-sue notices; this suit followed.

On September 3, 1997, this court certified the following defendant class:

> All former and present female employees of Ameritech Corporation and the other parties identified in Paragraph 8 of Plaintiffs' Complaint ("Ameritech") with respect to whom the Ameritech Pension Plan or the Ameritech Management Pension Plan (collectively the "Plans") recognizes service with American Telephone & Telegraph Company, its pre-January 1, 1984 subsidiaries and the allied companies of The Southern New England Telephone Company and Cincinnati Bell Inc. (the "Bell System Companies"), and who took a pregnancy or maternity-related leave from a Bell System Company prior to April 29, 1979, and who were or are participants in a Plan or Plans.

Agreed Mot. for Class Cert. at 2; *See* Order, No. 97 C 1441 (N.D. Ill. Sept. 3, 1997).

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1209 (7th Cir. 1993). Once a moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Becker v. Tenenbaum-Hill Assoc., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Fisher v. Transco Services-Milwaukee*, Inc., 979 F.2d 1239, 1242 (7th Cir. 1992). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Stewart v. McGinnis*, 5 F.3d 1031, 1033 (7th Cir. 1993).

II. TITLE VII

Title VII prohibits discrimination "against any individual with respect to [her] compensation, terms and conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-(2)(a). In 1978 Congress enacted the Pregnancy Discrimination Act ("PDA"), which amended Title VII by clarifying that discrimination based on pregnancy constituted discrimination based on sex. The PDA provides as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions;

> and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected . . . .

42 U.S.C. § 2000e-(k).

The parties do not dispute that because of the pre-1979 leave policies enforced by Ameritech's predecessors, women who took pregnancy leaves before April 29, 1979 currently have less credited service than otherwise similarly situated employees who took leaves of absence for other disabilities during that same period. Nor do the parties dispute [that whenever Ameritech bases current employment decisions (for example, eligibility for retirement) on employees' net credited service dates, women who took pregnancy leaves before April 29, 1979 are disadvantaged when compared to employees who took leaves of absence for other disabilities. Ameritech characterizes the harm resulting from its reliance on net credited service dates as the *effect* of discrete acts taken before 1979: its predecessors' refusal to grant more than 30 days service credit for pregnancy and maternity leaves and the corresponding adjustments to employees' net credited service dates upon their return to work. The employees characterize the harm resulting from Ameritech's current reliance on net credited service dates as a fresh act of discrimination; in other words, each time Ameritech bases employment decisions on net credited service dates—without re-calculating net credited service to remedy the effects of its predecessors' pre-1979 leave policies—it makes a fresh decision to exclude pre-1979 pregnancy leave and affirmatively adopts a facially discriminatory policy. As a result of their different characterizations, the parties dispute whether the employees' Title VII counterclaims are timely.

Title VII requires employees to file charges of discrimination "within three hundred days after the alleged unlawful

employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The employees argue their Title VII claims are timely based on three theories: (1) Ameritech's method of calculating net credited service is facially discriminatory and may be challenged at any time; (2) Ameritech's method of calculating net credited service may be challenged at any time because it was adopted for discriminatory purposes; and (3) Ameritech's reliance on net credited service constitutes a "continuing violation" of Title VII. These theories are discussed in turn.

A. Facial Discrimination

The employees argue Ameritech's method of calculating net credited service (*i.e.*, relying on net credited service dates without re-calculating pre-1979 net credited service based on post-1979 law) is facially discriminatory and may be challenged at any time. In the employees' view, the method of calculating net credited service employed by Ameritech's predecessors was a facially discriminatory *policy* that Ameritech *continues to apply* through its refusal to adjust net credited service dates, much like *Bazemore v. Friday*, 478 U.S. 385, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986), where a facially discriminatory salary structure was perpetuated after enactment of Title VII.

Bazemore warrants close attention. Prior to passage of Title VII, the employer (the North Carolina Agricultural Extension Service) maintained two separate branches of personnel: a "Negro branch" and a "White branch." *Id.* at 390. Although the employer merged the two branches in 1965 in compliance with Title VII, the employer did not eliminate the pre-merger salary disparities that existed between the two branches. *Id.* The Court of Appeals held the employer "was under no obligation to eliminate any salary disparity between blacks and whites that had its origin prior to 1972 when Title VII became applicable to public employers." *Id.* at 394. The Supreme Court rejected this conclusion, reasoning as follows:

> . . . that the Extension Service discriminated with respect to salaries prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII. To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute.
>
> * * *
>
> Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.

Bazemore, 478 U.S. at 395—96 (Brennan, J.). The employees argue net credited service dates that reflect pre-PDA pregnancy leave policies are analogous to the paychecks in *Bazemore* that were based on discriminatory salary policies established before Title VII.

Ameritech insists it makes decisions based on an employee's currently accrued service credit, regardless of gender. Ameritech points out its seniority system, on its face, credits all employees with whatever service credit they earned under prior plans and policies before Ameritech's pension plans came into existence in 1984; it does not "re-calculate" pre-1979 service credits, freshly excluding time spent on pregnancy leave each time it makes a decision. Ameritech concedes that its reliance on net credited service dates may

perpetuate the *effects* of its predecessors' pre-1979 policies, but maintains that its current system is facially neutral. *See United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977).

The court is persuaded that Ameritech's reliance on net credited service dates is not facially discriminatory, and that the employees' reliance on *Bazemore* is misplaced. In *Bazemore*, there was no facially neutral policy that explained why "each week's paycheck" delivered "less to a black than to a similarly situated white." *Bazemore*, 478 U.S. at 396. The original salary disparity in *Bazemore* was the result of a facially discriminatory salary structure adopted before Title VII was made applicable to public employers—a policy that explicitly paid black employees less salary *based on their race*. After Title VII became applicable, the salary disparity remained. Critically, the salary disparity remained not because of a facially neutral policy that gave effect to the prior facially discriminatory policy, *but because the facially discriminatory policy was still the proffered justification for "each week's paycheck."* The policy at issue in *Bazemore* was not facially discriminatory because it *resulted* in salary disparities along racial lines, or because salary disparities were allowed to *remain*; the policy was facially discriminatory because by its own terms it *dictated* salary disparities along racial lines. That is what it means for a policy to be "facially discriminatory." At bottom, *Bazemore* merely stands for the proposition that an employer does not have a license to continue enforcing a facially discriminatory policy merely because that policy was adopted before a change in the law made the policy illegal. Despite its broad language, *Bazemore* does not stand for the proposition that a facially neutral policy becomes facially discriminatory if the policy perpetuates discriminatory effects.

Here, Ameritech did not rely on a facially discriminatory policy to determine eligibility for retirement benefits. Ameritech determined eligibility for retirement benefits based (in part) on employees' net credited service dates, regardless of the employee's gender, and whether or not the employee had taken pregnancy leave. Ameritech concedes that its reliance on net credited service dates may disadvantage employees who took pre-PDA pregnancy or maternity-related leaves. But as Ameritech argues, the harm suffered by the employees does not result from Ameritech's current and facially neutral system for tracking years of service. The harm suffered by the employees is an *effect* of the pre-PDA policies enforced by Ameritech's predecessors. The fact Ameritech has not remedied the effects of those pre-PDA policies does not render their system for tracking years of service facially discriminatory. *Cf. International Bhd. of Teamsters v. United States*, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977). The court notes a different conclusion was reached by a divided panel of the 9th Circuit in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991) (relying on *Bazemore*). To the extent *Pallas* concludes that reliance on net credited service dates without re-calculating pre-1979 net credited service based on post-1979 law is a facially discriminatory policy, this court finds *Pallas* unpersuasive and respectfully declines to follow it.

B. Discriminatory Purpose

Title VII provides in pertinent part that:

> . . . an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose . . . (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted . . . or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2). The employees argue their claims are timely because Ameritech's current system for tracking years of service was adopted with an *intent* to discriminate. The employees argue that when Ameritech came into existence in 1984 and decided to base employment decisions on net credited service dates, Ameritech made the concomitant decision to adopt its predecessors' policies with respect to pre-1979 pregnancy leaves, and Ameritech affirmatively re-adopts those policies each time it relies on net credited service dates to determine employees' eligibility for benefits.

As an initial matter, the court does not accept the employees' assertion that Ameritech "adopted" its predecessors pre-1979 pregnancy leave policies. To be sure, Ameritech adopted net credited service dates that *reflect the effects* of its predecessors' pre-1979 pregnancy leave policies. But that is not quite the same as adopting the pre-1979 pregnancy leave policies themselves. For the reasons discussed in the previous section, this distinction is a meaningful one.

The important question is whether there is any basis to conclude Ameritech adopted the net credited service dates for a discriminatory purpose. As evidence of discriminatory purpose, the employees point to Ameritech's "constructive knowledge" of the passage of the Pregnancy Discrimination Act and the decisions in *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991) and *Carter v. AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994) (following *Pallas*; *vacated by* 1996 U.S. Dist. LEXIS 21836, 1996 WL 656571 (S.D. Ohio Sept. 13, 1996), per settlement agreement). The Pregnancy Discrimination Act does not speak to the specific issues presented in this lawsuit; consequently, knowledge of the PDA is not evidence that Ameritech chose to rely on net credited service dates for the purpose of discriminating against women who took pregnancy leaves before 1979. Nor are the issues presented by this lawsuit so straightforward that Ameritech was bound to

The Seventh Circuit recently addressed the distinction between actionable "continuing violations" and non-actionable effects of time-barred discrimination. See *Dasgupta v. University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997). Dasgupta claimed that as a result of national origin discrimination early in his career, his present salary was much lower than the salaries earned by his peers, even though they had all received similar raises in recent years. The court held that Dasgupta's claim was time-barred:

> There were no new violations during the limitations period, but merely a refusal to rectify the consequences of time-barred violations. It is not a violation of Title VII to tell an employee he won't get a raise to bring him up to the salary level he would have attained had he not been discriminated against at a time so far in the past as to be outside the period during which he could bring a suit seeking relief against that discrimination.

121 F.3d at 1140 (Posner, C.J.). Nor is it a violation of Title VII to refuse to grant an employee additional service credit to bring her up to the seniority level she would have attained had she been granted service credit for pregnancy leave(s) before 1979. Admittedly, this case presents close and difficult questions about the scope of the "continuing violation" doctrine in employment discrimination law. But the court is persuaded this case is more like *Evans, Teamsters, Ricks*, and *Dasgupta* than *Bazemore* and its progeny.

The employees argue that while they "may have had some hint that Ameritech might choose to continue using [net credited service dates] for assessing their retirement date when that day came," they were not *injured* until Ameritech denied their request for additional service credit in connection with the pension enhancements. Class Mem. at 20—21. The employees argue that denial of service credit is different from the forced resignation in *Evans*, the denial of tenure in *Ricks*

and the lower pay in *Dasgupta* because these actions had an "immediate effect," whereas the harm associated with denial of service credit occurs "not so much at the moment of denial as in the future." *Pollis v. New School for Social Research,* 132 F.3d 115, 118 (2nd Cir. 1997). *Pollis* arose under the Equal Pay Act and involved an allegedly discriminatory pay scale. In the course of distinguishing another case, Pollis suggested in *dicta* that "seniority rights are not of immediate value, but have determinate effect on the future terms of one's employment. . . . As a consequence, a discriminatory policy that results in a wrongful denial of seniority causes harm not so much at the moment of denial as in the future. . . ." *Id.*

Pollis cites no authority for the proposition that seniority rights lack immediate value. To the extent *Pollis* suggests the denial of seniority rights does not become a legally cognizable injury until the seniority system is applied to determine eligibility for benefits, the *dicta* in *Pollis* unpersuasive. Seniority rights at Ameritech have immediate value similar to the immediate value associated with tenure in *Delaware State College v. Ricks,* 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980). Neither tenure nor seniority rights are valuable in the abstract; both are valuable because of the *rights* and *benefits* that are associated with either tenure or seniority. Yet in *Ricks*, the Supreme Court held the statute of limitations began to run when Ricks was denied tenure, not later when his employment contract ran out and—because he was denied tenure—was not renewed. "When Ricks lost [tenure] he lost something of value, and so was injured." *Webb v. Indiana National Bank,* 931 F.2d 434 (7th Cir. 1991).

Here, it is undisputed that throughout their employment, management employees of Ameritech and its predecessors are and were provided with disability and pension *benefit statements* that indicate the employees' net credited service

dates.[2] Pl. 12(M) ¶ 45. It is further undisputed that throughout their employment, non-management employees of Ameritech and Ameritech's predecessors are and were provided with (or had access to) collective bargaining agreements. Stip. ¶ 59. These collective bargaining agreements state that net credited service dates are used to determine vacation benefits and selection, shift selection, promotion and transfer selection, layoff selection and recall rights, voluntary separation elections, the amount of separation payments, the amount and duration of sickness and accident disability benefit payments, and the date of periodic wage increases. *Id.* As for the non-management employees' pension benefits, any ambiguity concerning whether net credited service was effectively the same as "term of employment" as defined by the Ameritech Pension Plan ("pension plan") was resolved by the following language from the summary plan description for the pension plan, effective May 1989: "For example, to be eligible to retire with a service pension at age 65, you must have at least 10 years of *net credited service*." Defs. 12(M) ¶ 75 (emphasis added). Where an employee's net credited service determines the duration and amount of disability payments and all the other rights and entitlements listed above, it cannot be said that net credited service lacks immediate value to the employee. Here, the employees were plainly injured when Ameritech's predecessors refused to grant service credit for their pregnancy leaves. The fact that the *effects* of that injury become most severe as the employees near retirement does

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[2] The employees seek to create a genuine issue by arguing that even though they received benefit statements and the benefit statements indicated their net credited service dates, they did not know the net credited service dates were relevant to the benefit calculations. *See, e.g.*, Defs. 12(N) ¶ 45. On this record, no jury could reasonably infer the employees did not know their net credited service dates were relevant to the benefits calculation, where the dates were communicated to the employees *in benefit statements*.

not afford the employees a fresh limitations period. It is undisputed that Ameritech and its predecessors provided employees with various notifications of their net credited service dates and any adjustments made to those dates. Stip. ¶¶ 53-58. Under these circumstances, the employees clearly discovered or should have discovered the injury.

Nor does there appear to be any basis to support equitable tolling of the statute of limitations. If, as the employees sometimes argue, the PDA merely clarified the scope of Title VII and was not a drastic shift in discrimination law, then perhaps the employees should have had sufficient information when their net credited service dates were adjusted to suspect that their rights under Title VII were possibly violated. See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) ("The qualification 'possible' is important. If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run - for even after judgment, there is no certainty"). If, however, the PDA represented a drastic shift in discrimination law, then the change in law—together with the employees' knowledge of the relevance of net credited service dates and the fact employees would have been notified of any subsequent adjustments made to those dates - should have been enough to trigger a suspicion that their rights under Title VII may have been violated. The employees argue they reasonably waited to sue because Ameritech might have chosen to grant retroactive service credit as they neared retirement. The employees assert that Ameritech has "the power and ability" to grant retroactive service credit, as evidenced by the fact its predecessor once granted retroactive service credit in 1973 to workers who returned from strike. But the fact Ameritech has the *power* to grant retroactive service credit does not establish that the decision of Ameritech's predecessors to deny service credit for pregnancy leave is perpetually "not final." That decision became final when the employees returned to work and their

net credited service dates were adjusted. Accordingly, there is no basis to toll the statute of limitations. The employees' Title VII claims are time-barred.

III. EQUAL PAY ACT

Even assuming the employees could demonstrate a *prima facie* case under the Equal Pay Act, Ameritech has a complete defense because any disparity in pension benefits resulted from the nondiscriminatory application of Ameritech's seniority system (*i.e.*, Ameritech's reliance on net credited service dates). *See* 29 U.S.C. § 206(d). Ameritech has established a *bona fide* seniority system - one that is drafted and applied in a neutral manner. Accordingly, Ameritech is entitled to summary judgement as to this claim.

IV. ERISA

The employees argue Ameritech breached its fiduciary duty by discriminating against them based on pre-1979 pregnancy leaves. ERISA does not specifically prohibit gender discrimination. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983). As an initial matter, there is some question whether the employees should be allowed to "bootstrap" an ERISA breach of fiduciary claim onto a gender discrimination claim. Some courts have refused to recognize a separate ERISA claim in these circumstances. *See, e.g., Biggs v. North Central United Tel. Co.*, 1997 WL 760669 (S.D. Ohio Oct. 15, 1997). But even assuming the employees could state a separate ERISA claim, the court finds no support for the proposition that a plan administrator breaches its fiduciary duty to the plan participants by relying on a neutral seniority system that happens to give effect to the employer's pre-PDA leave policies. Accordingly, Ameritech is entitled to summary judgment as to any breach of fiduciary claims under ERISA.

V. STATE LAW CLAIMS

The state law claims mirror the employees' Title VII and Equal Pay Act claims. For the reasons previously discussed in parts II and III of this opinion, Ameritech is entitled to summary judgment as to the state law claims.

CONCLUSION

Defendants' motions for summary judgment are denied. Plaintiffs' motion for summary judgment is granted.

ENTER:

July 20, 1998

/s/ Suzanne B. Conlon
SUZANNE B. CONLON
United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs Ameritech Benefit Plan Committee, et al. and against defendants Annette Foster-Hall, et al.

Date: 7/20/1998

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Nos. 98-3096, 98-3101 & 98-3102

AMERITECH BENEFIT PLAN Appeals from the United States committee, *et al.*, District Court for the Northern District of Illinois, Eastern Division

Plaintiffs-Appellees,

v.

Nos. 97 C 1441 & 97 C 2209

ANNETTE FOSTER-HALL, *et al.*,
Defendants-Appellants,

SUZANNE B. CONLON, *Judge* AND BERNADETTE BERNABEL
Plaintiff-Appellant,

v.

AMERITECH CORPORATION, *et al.*,
Defendants-Appellees.

Before
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

Order of the Court of Appeals Denying
Rehearing and Rehearing En Banc
August 31, 2000

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed by counsel for the plaintiffs-appellees/defendants-appellees on July 27, 2000, all members of the original panel have voted to DENY the petition for rehearing. No judge* in regular active service requested a vote on the petition for rehearing *en banc*.

Accordingly, the petition for rehearing is hereby DENIED.

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* Chief Judge Flaum and Circuit Judge Coffey did not participate in consideration of the petition for rehearing *en banc*.

APPENDIX D

Names of Individual Petitioners

Adair Paget
Adams Debra
Adams Patricia
Addington Carol Ann
Addis Josephine
Alicea Carmen
Allen Brenda
Anderson Janice
Anderson Karen
Anderson Linda
Andre Jeanette
Anter Judith
Appleby-Darrow Rita
Archambeau Patricia
Armstrong Deneen
Arnold Joanne
Arnold Sharon Elaine
Artino Darline
Asciutto Mary
Aurino Barbara
Austin Madiline
Baas Charlene Rae
Baker Deborah
Ball Sandra
Ballard Elizabeth
Banasiak Kathleen
Banaszynski Carmen
Barnes Connie
Barnhart Linda Lou
Barrett Cozette
Barrett Kathleen
Barrick Roberta
Barron Shirley
Barto Mary
Bass Cheryl Lee
Bates Betsy
Beach Cynthia J.
Beck Barbara E.
Beck Gail
Beck Margaret
Becker Marjorie A.
Becker Sue
Begley Kathryn A.
Belden Karen G.
Bell Dorothy J.
Bell Barbara J.
Bellotta Nancy J.
Bennett Gertrude
Benton Magdalene
Berger Peggy
Best Patricia A.
Beverly Jane
Bierbaum Kathryn
Bilbrey Linda
Binger Janet K.
Birkey (Peterson)Linda I.
Blake Sharon M.
Blanchard Annette M.
Blanchard Barbara K.
Bloomfield Antonino M.
Bodbyl RaenAnne
Bolden Shirley
Boogaard Linda M.
Borucki (Kopena)Pamela M.
Bosley Dianna L.
Boston Brenda L.

Bowman Patricia
Boyd Charlene
Boyd Clara L.
Braden Catherine L.
Brewer Carol
Britton-Dozier Paula
Brogden Sally A.
Brogdon Nellie Roper
Brooks Juanita
Brooks Nathalia
Brown Donna
Brown Ella R.
Brown Judith L.
Brown Mary A.
Brown Patricia A.
Brown Sharon Elayne
Brown Vera
Brown-Royston M.
Bruce Marsha
Brull Lois A.
Brunsfield PamelaJ.
Brunson Glenda S.
Brzezinski Jane
Buck Diana S.
Buckner Karen
Buehl Elizabeth A.
Bunyan Sally
Burke (Foster) Joann N.
Burkows (Mackert) Sandra R.
Burnett-Roy Diane M.
Burnett (Watts) Patricia A.
Burns Joyce
Burris Barbara J.
Burton Carol A.
Bush Janice B.
Bushu Linda L.
Butts Michelle D.
Cain (Neavor) Linda M.
Cammarn (Carpenter) Carla L
Campbell Alice M.
Campbell Glenna M.
Campbell Harriet S.
Canty Brenda
Canty Lenice
Carney Jerlyn A.
Carpenter Carol
Carpenter Patricia L.
Carr Victoria Y.
Carter Charlestein
Caster Mary
Cemborski (Seifert)Marie B.
Chapman Janet S.
Chartrand Christine A.
Cheetham Therese
Chellevold Linda
Chovanec Carol A.
Christian Harriett J.
Chrystan Patricia M.
Clark Clara G.
Clark Linda M.
Clark Susan
Clarke Mary
Clemens Nancy M.
Clements Loraine
Clemons Norma J.
Clinkscales Patricia
Coates Linda F.
Cobb Peggy L.
Cochran Barbara K.
Coleman Katrina D.
Coleman Willie Jean
Coles Fredda L.

Collier Maxine K.
Collier Sharon R.
Collins Barbara A. Dale
Colvin Annette
Conner Diana Kay
Cook Jane M.
Cook Patricia A.
Cook Susan
Coolidge Linda J.
Cooper Sharon L.
Corliss Jane M.
Coulter Cora
Courter Phyllis D.
Cousino Karen K.
Covell Janice G.
Craft Sheila A.
Crowe (Mullins) Sandra
Cummings Madeline L.
Curless Marsha
Curley Mary E.
Currie Donna
Currie Renetta
Curtis Jacqueline A.
Custer Beatrice
Dalie Christina Jane
Dalton Dianne M.
Dalton Judith A.
Darlas Debbie
Darling Kristi
Darrow Rita C. Appleby
Dattilo Susan I.
Daugherty Ardyce P.
Dauthard Bernice
Davidson Bonnie
Davis Bernadette
Davis Yvonia
Dawson Cynthia M.
Deeger Karen D.
Delgadillo JoyceA.
DeMaagd Diane
DeMarcus Carol S.
Dempsey Patricia A.
Demyers-Moore Renee
Dennison Jean
Denton Shirley M.
DeRose Patricia
DeSpear Katherine
Deuparo Barbara J.
Devonshire Nancy J.
Dickerson Karla F.
Dickeson Linda
Diderrich Barbara V.
Dill Margaret M.
Dimavicius Patricia
Dinwieddie Pearl
Dishner Brenda F.
Dmytryka Carol Ann
Dodson Nancy J.
Doherty Patricia E.
Donell Nathalie C.
Donnie Zrothea L.
Douglas Irma J.
Dowd (Arata) Diane B.
Draper Annie B.
Drewnowski Linda K.
Driscoll Pamela E.
Dunn Lillie R.
Dwyer Connie R.
Dye Emma A.
Dziad Debra K.
Early Linda Y.
Easley Karen J.

Edgar Gloria J.
Edstrom Kathy
Edwards Janet
Elam Marlene
Elkins Marsha J.
Ellingboe Catherine
Elliott Janie E.
Ellis Karen S.
Ely Judy I.
Emch Kathleen M.
Endres Sandra L.
Engen Catherine S.
Enright Mary Ann
Edrmann Linda S.
Etter Ruth E.
Evanoff Ruth A.
Evans Ernestine H.
Evans Sandra
Everse Deborah S.
Exner Julie A.
Fazulak Mary Jo
Fedewa Linda
Fellows Sherrie L.
Felty JoAnn M.
Fenton Sandra L.
Fergerson Jacqueline A.
Fernandez Carmen Maria
Ferris Darlene Kathryn
Field Sharon
Fineout (Lightfoot) Katheryn
Fisher Diane B.
Fleming Velma
Fleury Jane A.
Flier (Ewing) Mary Jane
Flood Barbara A.
Fluker Charlene D.
Forcier Joan C.
Ford Rinda R.
Forton Roxanne R.
Forystek Caol A.
Foster Darlene M.
Foster Sandra 0.
Fowler Joan
Fox Diane Y.
Franceski Joyce M.
Franchi Genever
Frierson Bonnell L.
Fritz Mary L.
Fritze Lillian L.
Fry Patricia A.
Galambos Marcia J.
Garland Joanne M.
Garmon Bernice
Gates Charlotte
Gaulke Cristine L.
Gawkowski Jeanette
Geer Deborah J.
George Marlene
George Susan M.
Gerba Lorena A.
Gesen Linda K.
Ghighi Sharon W.
Gibson Sharon M.
Giddens Judy P.
Gilbert Constance M.
Gildersleeve Brenda
Giles Arlis
Gilkerson Annabelle
Gillespie Deborah A.
Giordano Madeline
Glover (Johnson) (Brown)
Pamela A.

Gnadr Cecilia M.
Goan Linda M
Godwin Maxine L.
Goetsch (Schaller) Donna M.
Gogoe Sheron
Gollick Deborah M.
Goltz Patricia
Gonder-Harris-Fluker
Sharon D.
Gonyer Mary M.
Gonzales Mirta Iris
Gonzales Mirta
Good (Birmingham) Daria S.
Goodfelllow Rosalla A.
Goodson Marie A.
Gorge Susan M.
Goujon-Borton Maria B.
Gramza Debra L.
Green Christina
Green Genevieve
Griffin Doris A.
Grooms Catharine S.
Groot Sally
Grow Kathleen
Grubb Carla J.
Guthrie Linda K.
Hafey Louise M.
Hagan Nancy
Halbig Pamela S.
Hall Alethea
Halloran Rosemary A.
Halter Teresa
Hamilton Carol
Hamman (Fisher)Virginia K.
Hamman (Wichert) Susan
Hammond Bonnie M.
Hampton Peggy A.
Hane Michelle D.
Hanon Kathryn L.
Hanson Kathryn L.
Hardin Betty L.
Hardnick Mildred
Harkins Catherine S.
Harner Clare A.
Harrigill Janelle C.
Harrington Karen
Harris Jane A.
Harris Julia R.
Harris Penny
Hartle Shirley Lovins
Hartman Ravella A.
Hartshorn (Saaler) Diane L.
Hartung Delores M.
Harvey Rose June
Hassell Nadine
Hatwood Carolyn L.
Hawes Patricia A.
Hawkins Donelda M.
Hawthorne Dorothy A.
Hayes Pamela M.
Hayworth Nancy
Heald Dorothy J.
Heaton (Wirkula) Anita L.
Heinrich Irene E.
Henderson Margaret E.
Burgess
Henderson Rozelle M.
Henning Philistine
Henry Carolyn
Hensley Inez M.
Hepner Judith K.
Hernandez Linda C.

Herncjar Jane K.
Hess Deborah L.
Hess Julia A.
Hicks Jaye N.
Higginbotham Victoria A.
Hildreth Mary J.
Hill Barbara J.
Hines Sandra K.
Hodges Beverly B.
Hoffman Shirley
Holdaway Connie
Holland Regina B.
Holloman Alexandra J.
Holloway Anna M.
Holloway Arletha
Holmes Joyce A.
Holtrop Rosalie A.
Horton Betty J.
Hough Gloria L.
Hovanic Catherine A.
Howard Mae C.
Howell Myra
Huffman Mable L.
Hughes Donna K.
Hughes Elaine K.
Hughes Sonia M.
Humble Karen J.
Humphrey Angel J.
Hundley Mildred A.
Hunter Andrea T.
Hutson Rita Anne
Illinsman Glenna
Ingles Janet
Isaacson Lynn M.
Isom Mayme
Jackson Edie
Jackson Linda F.
Jackson Phyllis
Jamar Shirley A.
James LaBertha
James Lenora J.
Jandeveer Catherine M.
Janick Catherine J.
Jankowiak Vonnie S.
Janney Dinah L.
Janssen Kay
Jefferson Linda D.
Jenks Sharon L.
Johnson Cheryl M.
Johnson Loretta G.
Johnson Margaret E.
Johnson Marsha D.
Johnson Nancy A.
Johnson Seriata
Johnson Shirley A.
Johnston Jacquelyn M.
Johrendt Sandra L
Jones Diane R.
Jones Elizabeth A.
Jones Elrena
Jones Helen A.
Jones Martha
Jones (Buckles) Joan
Jones (Jochum) Pamela E.
Jordan Delores
Jordan Marilyn
Jordan Patricia E.
Jorgenson Jill
Justice Gloria
Kaiser Arlene Mary
Kaiser Vicki A.
KammererAnn M.

Kartes Sally A.
Kastelic Patricia Ann
Kazmir Dorothy
Keena Linda Lee
Keller Eileen Ruth
Kelsch Carol M.
Kendall Jacqueline
Kennedy Karen L.
Kent Linda
Keplar Suzan
Kershner Anne K.
Keys Dallas E.
Killings Constance M.
Kilson Margaret
King Geraldine R.
King (Williams) Evlyn M.
Kippen Gayle
Klaas Grace J.
Kleiser Rosanka
Klem Elizabeth J.
Klepper Wanda M.
Klokis Kaye Y.
Klopfenstein Kathy
Kmiec Linda
Knox Henrietta Y.
Kohls-Ruehr Mary L.
Kolby Barbara L.
Kosick Constance
Kostuck Linda
Krachie Bonnie K.
Krupp Ruth E.
Kuglen Martha
Kurtzakowski Elizabeth
LaCourse Carol
LaFontaine Sharon
Lamorand Mary L.
Lamp Blanca E.
LaPlante Georgia A.
LaPorte Carol
Larsen Virginia A.
Larson Vicki L.
Lata Elaine
Laycock Elizabeth J.
Leasure (McCarrich) Christine M.
Lee Avonia
Lee Barbara
Lemmens Beverly A.
Lemonta Bridget M.
Leonard Velmateen
LeQuia Sonya E.
LeVan Cathy
Lewis Nini
Lewis Patricia
Lewis Carole
Lewis Carole E. Tucker
Ley Roberta Lyne
Lindee Ella M.
Lindley Jean L.
Lindsay Marjorie F.
Littleton Sandra M.
Livingston Mary L.
Livingston Roxanne Reyes
Loewengruber (Gunther) Patricia
Logan Sheila M.
Longcore Janet R.
Longmire Gertrude E.
Lorence Elizabeth J.
Redding-Lott Rosemary
Lotz Gloria J.
Love Andrea

Love Marsha A.
Lowden Johanne M.
Lubin Linda D.
Ludwig Margaret M.
Luhrs Patricia L.
Lund Deborah C.
MacArthur Nancy
Machin Noreen
MacNealy Mary Jean
Macon Charlotte A.
Mager Cheryl D.
Maichi Herta G.
Manhardt Elizabeth L.
Mans Lana R.
Marion Sharon L.
Market Vicki
Marsh CarolJean
Marshall Jacqueline F.
Marshall Marjory K.
Martin Alecia Y.
Mason Cathy
Matney Marcia
Maurer Melody
Maxal Beverly Joe
Maxell Beverly
Maxwell Juanna E.
McArthur Diana
McClain Jacqueline
McClain Reynell O.
McCord Barbara S.
McDowell Marionette
McFall Shirley
McGrath Patricia L.
McGreary Mary
McKeever Georgeanna
McKnight Gloria
McNeil Lynn
McPherson Patricia A.
McRae Esther
Means Agnes
Medlin Patricia
Mervosh ShirelyA.
Meyer Bonnie K.
Michalowski Linda J.
Miles Carolyn
Miller Janet S.
Mills Pamela A.
Miner Catherine A.
Ming Sandra
Moneypenny Donna
Moon Sandra L.
Moore Barbara R.
Moore Beverly D.
Moore Chris
Morris Alma J.
Morse Laurie L.
Moultrie Johnnie P.
Mulhall Sandra K.
Mullins Betty J.
Mumford Beulah G.
Murphy Diane M.
Murphy Mary A.
Murphy Pamela A.
Nash Lois
Newlin Doris K.
Newton Loyce J.
Nichols Barbara J.
Nichols Frances
Nicholson Valerie J.
Nicolai Cynthia M.
Niendorf Linda A.
Nietubicz M. Dawn

Nix Melba J.
Norris Evelyn F.
Norris Shirley Anne
Nowicki Nancy K.
Nuber Cheryl L.
Nuttall Cynthia Ann
Odeuvald Debbie A.
Ogg Virginia E.
Oliver Delores J.
Olson Gloria J.
Osgood Dianne M.
Osowski Theresa
Overbey Pearl H.
Owens Carrie L.
Page Susan
Palmitieri Karen
Pandolfo Karen
Park Linda
Park Nancy
Parker Diane
Pasinski Patricia
Patrick Zenora
Patton Sally
Paul Ida
Pauli Cathy
Pavey Donna R.
Pekarek Fredia
Pendergast Mary
Perry Sheila
Perugini Janice
Peterson Patricia
Peterson Vivian
Phillips Mary Lou
Pickett (Mackey) Patricia
Pierson Jacqueline
Pirtle Blanche
Pizzino Carol
Plants Gail
Pline Cheryl
Polden Sharon
Pope Betty
Pope Jerry
Pope (Scherer)Cheryl
Porter Judith
Powers Nancy
Preston Cynthia
Prewitt-Brown Willa
Price Nancy
Priest Iler
Pringh Nancy
Pritchard Dale
Pruitt Willie
Pryor C. Lynne
Pugh Erma
Pulfer Wanda
Quinn Jean C.
Ramsden Martha
Rankin Anna
Rauwerda De'Ann
Reed Deborah
Reed Lucy
Reed Patricia
Reese Rebecca
Reeves Frances
Reichman Jacqueline
Remson Nicola
Repke Jane
Restainer Victoria
Rhoades Paulette C.
Rice Donna L.
Richardson Louise E.
Richey Beverly A.

Rieves Dianne Marie
Riffle Phyllis M.
Rigden Patrice
Riley (Johnson) (Davis) Cynthia N.
Ringer Alma M.
Roach Suzanne M.
Robbins Della
Roberts Crystal J.
Roberts Joy R.
Roberts Maryanne
Robinson Beverly
Robinson Yvonne
Robison (Hansen) Judith L.
Rokosky JoAnn
Roof Donna E.
Rose Joan E.
Ross Shirley R. Erickson
Rouchion Brenda L.
Rowan Linda A.
Ruch Veronica A.
Rudolph Margaret A.
Ruminski Margaret J.
Rushman Margaret A.
Russell Christine M.
Ryan Theresa A.
Sabisch Margaret K.
Sadler Debra K.
Sagert Janet E.
Salata Nina J.
Sams Peggy S.
Samuels Rhonda
Sanchez Margaret A.
Sank-Williams (Newton) Mary J.
Santy Sandra
Saults Sharon
Saykally Marjorie
Schmidt Karem
Schmidt Sandra L.
Schneider Kathleen A.
Schneider Rose M.
Schober Suzan A.
Schuette (Reimer) Debra A.
Schwab Bonita L.
Schweda Cynthia
Scott (Harris) Jannie M.
Scozzafave Darlene
Seevers Sue E.
Setter Judith R.
Severson Renae R.
Sewell Blanche
Sexton Debra C.
Shadduck Robin
Shannon Edith M.
Sharif Deborah Chapman
Sharpley Glenda
Shaw Janice F.
Shearer Karen
Shepherd Paula P.
Sherrill Virginia
Schields Connie L.
Shiffman Charol L.
Sidner Sherry E.
Sielaff Linda
Sieloff Diane
Simail Anna
Simmons Marveta
Simuel (Arnold) Celia O.
Skamiera Mary R.
Skurski Susan C.
Slatt Sharon

Slezak Jane E.
Sluiter Maria A.
Smallwood Debra L.
Smigul Paula J.
Smiskey Kay M.
Smith Brenda R
Smith Christine L.
Smith Constance D.
Smith Denise
Smith Irene
Smith Janice A.
Smith Johnnie M.
Smith Jule A.
Smith Marri Y.
Smith Patricia A.
Smith Linda
Sorensen Arlene
Spangler Susan M.
Sparks Sherline
Spears Joann E.
Spencer (Spates) Harriet L.
Spight Darice E.
Spires Judy
Springman Leslie
Stanislowski Darlene
Stansfield Joanne Rebecca
Steeg Dian
Stegehuis Uneta P.
Steger Pamela A.
Stein Deanna L.
Steiner Mary J.
Steinko Virginia
Stemos (Winders) Carol S.
Stephens Clara L.
Stephens Margariette
Stepnoski Donna L.
Stevens Kathleen
Stewart Diane E.
Stewart Patti
Stewart Vanessa D.
Stewart (Reiner) Randi Sue
Stocker Patricia A.
Stockford Mary Kay
Stodghill Barbara W.
Storts Diana L.
Strauss Kathryn L.
Suber Beverly
Sullivan Judith
Swain Donna M.
Szilaqyi Theresa M.
Tackla Linda Susan
Tankovich Jane M.
Tarpley Patncia
Tarver Catherine
Tate Carolyn S.
Taylor Janice Marie
Taylor Minnie Pearl Kyser
Thomas Denise J.
Thompson Janetta
Thompson Lottie L.
Thompson Bessie
Thompson Diana L.
Thornton Jannie M.
Thruston Joanna Lynn
Tisevich Sharon Louise
Toyer Rosalind F.
Trepka Mary
Triplett Christine A.
Trzaskowski Grace
Tubbs Doris M.
Tucker DeVonne
Turner Teletha

Tynan Sharon L.
Tyson Elizabeth
Underwood Olivia
Urbanski Anne L.
Urquhart Betty J.
Valko Judith E.
Van Aacken (Groh) Gloria
VanHelden Jane
Varga Beatrice S.
Varney Martha J.
Vassallo Amy L.
Vaughn Vicky L.
Vaught Judith D.
Venzon (Little) Georgia C.
Veverka Rebecca K.
Victor Maria R.
Vistein Linda
Vondeling Sherry D.
Wagner Alicia
Wallace Patricia H.
Wallace Deborah C.
Wallace Maxine L.
Walsh Sharon L.
Ward Karen
Ward Kathleen S.
Ward Mildred L.
Warren Vickie D.
Washington Mariah
Wazniak Sheri D.
Weaver Rita D.
Webb Nancy R.
Webb Karen D.
Wehler Noreen J.
Weis Linnea
Welch (Colvin) Barbara L.
Wells Barbara Ann
Wells Jetty L.
Wenberg (Drinkwine) Cheryl L
Wendling Kathleen M.
Wendorf Connie K.
Wenger Margaret
West Cecilila Lynn
West Merrie
West (Nemeth) Sandra
White Linda L.
White Linda S.
Whitfield Elsie
Whiting Peggy
Whitson Marie
Whitten JoanE.
Whittenburg Margene
Wicklund Carol
Wiesner Norma J.
Wiggins Sharon L.
Willgues Judith A.
Williams Barbara Ann
Williams Carolyn J.
Williams Faye A.
Williams Hilah
Williams Judith E.
Williams Kristine J.
Williams Renee
Williams Theresa
Williams Winnie F.
Williams Zaneeta
Williamson Betty A.
Wilmoth Sharon Ann
Wilson Catherine A.
Wilson Joan R.
Wilson Sarah R.
Wiltjer Constance

Wincek Mary Lou
Winkelman Karen J.
Winn Karen S. Lawrence
Withey Virginia E.
Witkowski Carol T.
Witsaman Debora
Wojtczak Harriet M.
WolfgangBarbara A.
Wood Rose Ann
Woods Era M.
Worda Patricia
Worley Beverly J.
Wright Dianne Christopher
Wright Elaine
Young Ozella
Zank Patricia M.
Zaremba Susan K.
Zielinski Mary K.
Ziglinski Patty
Zimmer Bonita J.
Zimmerman Marilyn

Gibson Brenda
Kloess Helen
Leach H. Carleen
Parrish Sharon
Timmerman Frances
Barnes Phyllis
Bober Betty
Champer Janet
Croddy Linda
Elick Patricia
Gardner Lesle
Harmacinski Dolores
Niemeier Polly
Flynn Adomaitis Debby
Allen Anne Marie
Amato Carol
Andrews Vicki
Dallos Evelyn
Grover Leanne
Johnson Ruth
Jones Virginia
Wingo Francie
Adkins Sara Sue
Anderson Debra
Appleton Janet
Ballard Sandra
Kreger Kathryn
Perril Margaret
Richard Diane
Smitherman-Mui Brenda
Avery Mary Jo
Beattie Diana
Berger Christine
Connell Shirley
Ray Carolyn
Cuprys Cheryl
Lanzy Patrica
Gaulden Phyllis
Massengale Linda
Tofstad Barbara
Sturdivant Gloria
Weininger Karen
Riddlebarger Teresa
Cox Kathleen
Musick Jo
Sears Carol
Gregg Cynthia
Appling Linda
Wiczynski Joyce
Ewing Cathy
Clay Jackie

APPENDIX E

Corporate Subsidiaries of Ameritech Corporation

1. Illinois Bell Telephone Company
2. Indiana Bell Telephone Company, Inc.
3. Michigan Bell Telephone Company
4. The Ohio Bell Telephone Company
5. Wisconsin Bell, Inc.
6. Ameritech Services, Inc.
7. Ameritech Advanced Data Services of Illinois, Inc.
8. Ameritech Advanced Data Services of Indiana, Inc.
9. Ameritech Advanced Data Services of Michigan, Inc.
10. Ameritech Advanced Data Services of Ohio, Inc.
11. Ameritech Advanced Data Services of Wisconsin, Inc.
12. Ameritech Mobile Communications, Inc.
13. Ameritech Information Systems, Inc.
14. Ameritech Credit Corporation
15. Ameritech Development Corporation
16. Ameritech International, Inc.
17. Ameritech Publishing, Inc.
18. Ameritech Interactive Media Services, Inc.
19. Ameritech New Zealand Limited
20. Ameritech Health Connections, Inc.
21. Ameritech Denmark, Inc.
22. Ameritech Communications, Inc.
23. Ameritech New Media, Inc.
24. Ameritech Telecommunications Services Company

Supreme Court, U.S.
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No. 00-864

IN THE

Supreme Court of the United States

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, BERNADETTE BERNABEI, ANNETTE FOSTER-HALL, *et al.*,

Petitioners,

v.

AMERITECH BENEFIT PLAN COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL EMPLOYEE RIGHTS INSTITUTE (NERI), NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA), AND THE OHIO NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plan administrator's fiduciary duties under ERISA are breached when the administrator perpetuates pregnancy discrimination?

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INTEREST OF THE AMICI CURIAE[1]

The NATIONAL EMPLOYEE RIGHTS INSTITUTE (NERI) is a non-profit 501(c)(3) organization serving all employees nationwide. NERI helps individuals, both employed and unemployed, understand, enforce and expand their rights in the workplace. NERI provides information, education, and assistance to individual employees and promotes public policies to advance employee rights. NERI provides resources to other organizations, unions and civil rights groups that help employees.

As an organization that helps employees enforce their rights, NERI is deeply concerned that all forms of discrimination in the workplace be eliminated. Pregnancy discrimination is one of the many ways in which women have been treated unfairly in the workplace. Current decisions by pension plan fiduciaries that perpetuate pregnancy discrimination harm many thousands of employees. NERI seeks to help these employees by participating as *amicus curiae*.

The NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) is a voluntary organization, founded in 1985, of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership

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1. The parties have consented to the filing of this brief; this written consent has been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *Amici Curiae* state that counsel for the parties have not authored this brief in whole or in part. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Kolstad v. American Dental Association*, 527 U.S. 526, 119 S. Ct. 2118 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); and *Burlington Industries v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998).

The OHIO NOW LEGAL DEFENSE AND EDUCATION FUND (Ohio NOW LDEF) is a non-profit corporation originally founded in 1981 by the trustees of the Ohio Chapter of the National Organization of Women. The Ohio NOW LDEF provides assistance to bring women into full participation in all activities of American life and conducts research and education concerning discrimination in our society. As part of its activities, the Ohio NOW LDEF provides legal counsel or other support to victims of employment discrimination and conducts regular programs to prevent discrimination. It and the Ohio NOW Chapter have been granted leave to file an *amicus* brief in numerous cases before the Ohio Supreme Court.

The Ohio NOW LDEF is particularly concerned that women not be discriminated against because of pregnancy in the provision of employee pension benefits. The Ohio NOW LDEF recognizes that current decisions of plan fiduciaries are perpetuating pregnancy discrimination against women and denying them valuable opportunities to retire and to enhance their level of retirement benefits. In addition, many of the women affected by the fiduciary decisions at bar, as well as other similar existing lawsuits, are residents of Ohio. For these reasons, the Ohio NOW LDEF seeks to participate as *amicus curiae*.

STATEMENT OF THE CASE

This case arises out of a new early retirement program, the Ameritech Pension Plan Enhancement Program (APPEP), offered by Ameritech to its employees in 1994.[2] The APPEP, in part, amended the Ameritech Pension Plan (the Plan) which is governed by ERISA. The amendment gave an additional three years service and three years of age to employees, enabling certain otherwise-unqualified employees to qualify for immediate retirement benefits under the plan.

The critical issue in this case was the amount of service credit, or "term of employment," under the Plan for women who had taken pregnancy leaves of absence prior to 1979, the effective date of the Pregnancy Discrimination Act (PDA). The Plan granted the administrator, an ERISA fiduciary, "full discretionary authority to interpret the terms

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2. Also involved in this litigation are early retirement programs and amendments to the Ameritech Management Pension Plan in 1992 and 1993.

of the Plan and to determine eligibility for an entitlement to benefits in accordance with plan terms." (Ameritech Pension Plan (as amended Jan. 1, 1994) § 3, ¶ 4, p. 15).[3] The Plan granted the administrator the power to decide a participant's "term of employment," so long as the decision was based on plan documents and was consistent with the law. *Id.* § 6, ¶ 3, p. 97. No Plan provision required that pregnancy leaves be excluded from "term of employment" calculations.

After the APPEP was adopted, some 1400 women challenged denials of benefits for failure to include in their service calculation all time they were off work on pre-PDA pregnancy leaves. The administrator denied the claims relying on Plan language that it interpreted to require the administrator to accept leave of absence determinations made pursuant to company policies in effect at the time of the leave. That interpretation was disputed below. However, even if this were the case, the plan also gave the administrator the power to "make administrative changes in the Plan, as well as changes which, in the opinion of the [administrator], [we]re required . . . or made desirable by federal or state statutes, regulations or rulings applicable to the plan." *Id.* § 9, ¶ 1, p. 120.[4]

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3. The text of the Plan was in the Court of Appeals record as Joint Exhibits, Vol. I, Ex. 3.

4. In the past, the administrator had, in fact, exercised its authority to make administrative changes to the plan. For example, in the early 1970's the administrator made an administrative change to retroactively grant service credit to workers who were out of work due to a strike, even though the plan terms did not otherwise provide for such service credit.

Instead of exercising its discretion to include time for leaves of absence due to pregnancy prior to 1979, the administrator relied on an historical service calculation system applicable to the **Ameritech company**, not to the **plan**. This historical, "net credited service" system excluded much of the pregnancy leave time taken by women prior to 1979, while at the same time it included all of the disability time taken by men prior to 1979. The 1994 early retirement plan amendment did not adopt this system nor require the administrator to use this system in calculating an employee's "term of employment." Thus, the administrator's decision to apply this discriminatory system was an act that perpetuated pregnancy discrimination against women. The administrator's decision affected thousands of women, many of whom were not able to retire early in 1994, yet it permitted similarly situated men to retire early.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ to Resolve a Split in the Circuits

The decision in the court below directly and irreconcilably conflicts with *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), *cert. denied*, 502 U.S. 1050 (1992). *Pallas* recognized that perpetuation of pregnancy discrimination constituted a breach of fiduciary duty,[5] while the court below rejected that holding.

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5. ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries . . . ," *inter alia*. 29 U.S.C. § 1104(a)(1)(A)(i).

Early retirements have been denied female participants in pension plans solely because years earlier they took pregnancy leave. Throughout the 1980's, 1990's and today, employers have frequently used early retirement incentives to achieve desired employment levels. These incentives facilitate ending a career in a manner that is often mutually satisfactory to employer and qualifying employee. As companies offer more opportunities for their employees to retire early, the discrimination of the past is often revisited upon women through current eligibility decisions. Women who bore children were at one time forced out of the workforce and treated less favorably than male employees absent from work with other disabilities. Plan Administrators are now making current retirement benefit decisions that perpetuate that same discrimination against women, under early retirement plans, by denying the service credit that similarly-situated men receive. The result: women are deprived of better retirement benefits by this current act of pregnancy discrimination.[6]

Plan Administrators are typically afforded discretion, and were actually given such discretion in this case, to interpret plans. As in other cases, the Administrators here failed to use the discretion given them to interpret length of service favorably to these women, instead relying on the company's discriminatory "net credited service" system that favors one set of employees (disabled men) over another set (pregnancy disabled women).

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6. There was no evidence in the record below that giving credit for past pregnancy leaves would jeopardize the fiscal viability of this plan. The amount of service credit involved is relatively small in terms of the number of covered employees, but the service credit is critical to female employees who are otherwise qualified for these plans. Moreover, because the employer seeks to entice employees with such plans, broadening the pool of eligible employees would actually serve its objective.

These exact discrimination-perpetuating decisions have led to a great deal of litigation. A clear split in the Circuits has now emerged. The Ninth Circuit, in *Pallas*, held that "[d]iscrimination constitutes a fiduciary breach for purposes of ERISA." *Id.* at 1327. Now under nearly identical facts, the Seventh Circuit in the case below found that there was no fiduciary breach. *Ameritech Benefit Plan Comm. v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000) (Pet. App. 17a-19a).[7]

A. The Split In the Circuits

1. Courts Holding that Discrimination Constitutes a Fiduciary Breach under ERISA

In *Pallas v. Pacific Bell*, the Ninth Circuit considered a case with nearly identical facts to those in the case at bar. The plaintiff in *Pallas* challenged the discriminatory denial of service credit under a 1987 early retirement plan. The plan fiduciary failed to include the plaintiff's service time for leaves of absence due to pregnancy that occurred prior to passage of the PDA in 1979. Rather, the fiduciary used the company's discriminatory service calculation system that denied women credit for pregnancy leave while awarding credit to men who missed work due to other disabilities. 940 F.2d at 1326. The court determined that the 1987 amendment "adopted, and thereby perpetuated, acts of discrimination . . ." *Id.* at 1327. The Ninth Circuit, relying on *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert denied*, 464 U.S. 813 (1983), held that

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7. In this brief, references to the Appendix of Petitioner's Brief shall be abbreviated "Pet. App."

"[d]iscrimination constitutes a fiduciary breach for purposes of ERISA."[8] *Pallas*, 940 F.2d at 1327.

Two District Courts in the Sixth Circuit agree with *Pallas* and follow its reasoning. In *Carter v. AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994), *vacated by consent of the parties*, 1996 WL 656571 (S.D. Ohio Sept. 13, 1996), the court considered a similar issue involving an early retirement plan of AT&T. In *Carter*, the Plaintiff was denied early retirement benefits in 1993 because the Plan fiduciary failed to credit her with service time for a forced pregnancy leave she had taken in 1966-1967. The court first held that both the "[early retirement] enhancement system enacted by AT&T and **AT&T's denial of credit for pregnancy leave** violate[d] Title VII." *Id.* at 1444 (emphasis added). Because the court found that the Defendant discriminated on the basis of gender under Title VII in denying service credit for the pregnancy leave, it also found that the plan administrator breached its ERISA fiduciary duty by failing to determine the plaintiffs service in a non-discriminatory manner. *Id.* at 1446-48 (citing to *Pallas*, 940 F.2d at 1327).

The Court in *Sweeney v. Employees Benefit Committee of Ameritech Publishing Co.*, No. 93-CV-74302 (E.D. Mich. Mar. 2, 1996), *vacated by stipulation and order*, (E.D. Mich. May 17, 1996) (Lodging App. L-1 – L-18), carried this analysis a step further. In *Sweeney*, the plaintiff challenged one of the plans at issue in the case at bar, the 1992 enhancement program. This plan was also administered by an Ameritech plan fiduciary. As in the case at bar, the plan administrator

8. *Pallas* was a 2-1 split decision in most respects. However, the dissenting judge agreed with the majority on the ERISA fiduciary breach issue, making the decision unanimous on that issue. *See Pallas*, 940 F.2d at 1329.

refused to give the plaintiff service credit for her pregnancy leave and instead denied her claim relying on the company's pre-PDA pregnancy leave policies. The court held that the exercise of discretion that discriminatorily denied her service credit for time on pregnancy leave constituted a fiduciary breach. Most notable, however, was that the plaintiff did not bring a simultaneous Title VII claim to challenge the conduct but relied solely on ERISA. Despite the lack of a supporting gender discrimination claim, the Court held "the Defendant's discriminatory application of the 1966/1967 maternity leave policy was arbitrary and capricious and does constitute a fiduciary breach under section 1104 of ERISA." (Lodging App. L-13)

2. Courts Holding that Discrimination Is not a Fiduciary Breach Under ERISA

Here the Seventh Circuit took a very different approach to the issue of fiduciary breach and pregnancy discrimination. Employees in the case at bar, like the plaintiffs in *Pallas*, *Carter* and *Sweeney*, were denied benefits under a post-PDA early retirement plan. These female employees too would have qualified for early retirement benefits had the plan fiduciary included service time while they were off on maternity leave (prior to 1979). The Seventh Circuit rejected the notion that such discrimination constituted a breach of fiduciary duty.[9] Rather, the court held that adherence to the historical method of calculating service satisfied its duty to

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9. While the court below did not categorically reject the concept that discrimination could constitute a fiduciary breach under ERISA, it did so under facts indistinguishable from *Pallas*, *Carter*, and *Sweeney*, and it gave little hint under what circumstances it might find a fiduciary breach. *Ameritech*, Pet. App. 18a-19a.

act in the best interests of the participants as a whole.[10] (Pet. App. 19a)

In *Redding v. AT & T Corp.*, No. 96-WY-807-CB (D. Colo. July 25, 1996), *aff'd*, 1997 WL 537882 (10th Cir. Sept. 2, 1997) (unreported) (Lodging App. L-19 – L-24), the District of Colorado also addressed the issue of whether discrimination constituted a fiduciary breach.[11] In finding no fiduciary breach, the Court stated "Redding's first claim fails because ERISA does not provide a cause of action for civil rights violations. The proper vehicle for a cause of action based on gender discrimination is Title VII, and the proper vehicle for a cause of action based on pregnancy discrimination is the PDA." (Lodging App. L-21) (citations omitted). Thus, the court held as a matter of law that

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10. Interestingly, the court recognized that fiduciaries had a duty of loyalty similar to common law trustees. In addition, the court stated that "[a] common-law trustee was not allowed to favor one class of beneficiaries over another." Pet. App. 19a. (citing Restatement of Trusts § 183). Yet, the court turned this notion of favoritism of classes on its head, implying that the prohibited "favoritism" would consist of upsetting the historical calculation system and crediting this group of women with service for time spent on pregnancy leave. *Id.* Apparently, the court did not view crediting men for time away from work due to non-pregnancy-related disabilities as favoritism.

11. *Redding* involved slightly different facts from the other cases cited above. In *Redding*, the Plaintiff apparently was not challenging her length of service under an early retirement plan, but rather under the company's regular retirement plan. Ms. Redding had taken 12 pregnancy-related leaves of absence amounting to 854 days off. The case was dismissed under Fed. R. Civ. P. 12(b)(6). The difference between early retirement and normal retirement does not, however, affect the existence of a breach of fiduciary duty.

discrimination in plan interpretation could not constitute a breach of fiduciary duty.[12]

This Court should take this case to resolve the split in the Circuits.

B. This Court's Opinion In *Shaw v. Delta Airlines* Has Contributed To The Confusion Below

In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), this Court decided, *inter alia*, that ERISA preempted the parts of a state fair employment practices law that, prior to

12. It could be argued that certain language in the district court opinion indicates that the court would follow the *Pallas* line of cases under different facts. Specifically, the court stated:

> Redding tries to avoid this statutory rule by arguing that her claims are based on the plan administrators' decision in 1995 to deny Redding's request for service credits. This argument might work if the administrators had done something other than refer to the plan provisions in effect during the time of Redding's maternity leaves, and determine that under those plans she was not entitled to such credits. The administrators did not exercise any discretion in making this decision. They simply relied on the terms of the plans governing the calculation of Redding's credits.

(Lodging App. L-21 – L-22) Thus it could be argued that if the plan fiduciary had exercised discretion in this case that the court would have recognized an action for fiduciary breach. However, the quote comes from the section of the opinion wherein the court addresses the time of accrual of the cause of action. It does not address the substance of the fiduciary breach claim on which the court, as quoted above in the text, was quite clear. The Plan at bar afforded discretion to its administrators in interpreting how to calculate service credit.

enactment of the federal PDA, prohibited discrimination in employer benefit plans on the basis of pregnancy.

In the opinion, this Court stated in dictum: "ERISA does not mandate that employers provide any particular benefits, and **does not itself proscribe discrimination in the provision of employee benefits**." *Id.* at 91 (emphasis added). This statement by the Court has caused some confusion. The Court was undoubtedly referring to settlor functions, such as the act of creating or amending a plan, when it referred to discrimination.[13] *Id.* at 97 (referring to the preempted human rights law "which prohibits employers from **structuring** their employee benefit plans in a manner that discriminates on the basis of pregnancy") (emphasis added).

This Court's statement about ERISA's proscription of discrimination was unsurprising because, as this Court has made clear, such settlor functions are not fiduciary acts and thus are not subject to ERISA's stringent fiduciary duties. *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996). However, at least two of the lower courts mentioned above have interpreted the language from *Shaw* more broadly. For example, the District Court in *Redding* cited the above language from *Shaw* in dismissing the plaintiff's fiduciary breach claim. (Lodging App. L-21). In addition, the Seventh Circuit in the case at bar noted that "there may be a problem with shoe-horning a discrimination claim in to the ERISA notion of fiduciary duty, because ERISA 'does not itself proscribe discrimination in the provision of employee benefits.' " *Ameritech*, Pet. App. 18a (citing *Shaw*, 463 U.S.

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13. A decision to discriminate against protected groups in plan implementation or amendment may, of course, violate Title VII or some other discrimination law.

at 91). While the Seventh Circuit noted that the *Shaw* Court did not address whether discrimination could ever constitute a breach of fiduciary duty, its opinion still indicates some uncertainty over the *Shaw* language. *Id.* 18a-19a.

This Court has previously recognized that ERISA's "fiduciary duties draw much of their content from the common law of trusts . . ." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). In addition the Court has recognized that Congress intended the courts to develop a body of federal common law based on trust principles. *Id.* (citations omitted) ("with respect to the trust like fiduciary standards ERISA imposes, Congress 'expected that the courts will interpret this prudent man rule (and other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans,' (citations omitted), as they 'develop a 'federal common law of rights and obligations under ERISA regulated plans.' ").

One fiduciary standard under the common law of trusts is the duty to deal impartially between two or more beneficiaries. Restatement (Second) of Trusts § 183 (1959) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.") The Seventh Circuit has adopted this fiduciary standard into the ERISA common law. In *Summers v. State Street Bank & Trust Co.*, 104 F.3d 105 (7th Cir. 1997), the court said that it would be a breach of fiduciary duty under ERISA to favor active employee participants over retired employee participants. The court stated: "It would be picking and choosing among beneficiaries, in violation of the traditional duty imposed by trust law of impartiality among beneficiaries." *Id.* at 108 (citing Restatement (Second) of Trusts § 183).

If discrimination between active and retired employees is a breach of fiduciary duty under ERISA, then certainly discrimination on the basis of pregnancy, which is proscribed specifically by federal law, must also be a breach of fiduciary duty. This conclusion is implicit in the interpretation of fiduciary obligations by the Department of Labor:

> Plan fiduciaries are responsible for administering their plans to assume compliance with both ERISA and other applicable federal laws, in recognition that such other laws are not pre-empted by ERISA. See 29 U.S.C. § 1144(d). Similarly, where the terms of a plan are consistent with ERISA, but are not consistent with requirements of other applicable federal laws or regulations, plan fiduciaries should take appropriate steps to assure that the plan is amended to comply with all applicable legal requirements . . . Thus . . . non-compliance [with another federal] statute and regulations issued thereunder would not be excused on the basis that the plan is in compliance with ERISA.

Department of Labor Opinion Letter 93-23A (1993 WL 349626).[14]

Furthermore, pregnancy discrimination by an ERISA fiduciary may not be actionable under any other federal law.

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14. The DOL interpretation of the ERISA fiduciary duty is entitled to great weight since DOL administers ERISA. *Chevron USA v. Natural Resources Council*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

Indeed, it is unclear whether, under all circumstances, a plan fiduciary fits the definition of an "Employer" under either Title VII or the Equal Pay Act. *See* 42 U.S.C. § 2000e(b); 29 U.S.C. § 203(d). It is unlikely that Congress intended fiduciaries to escape liability for acts that would otherwise constitute unlawful discrimination.

This Court should take the opportunity to clarify its statement in *Shaw* and at the same time determine whether the fiduciary duty of impartiality is properly a part of the federal common law of ERISA.

II. Review of the Decision Below is of Tremendous Importance to Women Nearing Retirement Age[15]

Gender is a critical hidden factor in the retirement security equation. Women tend to receive significantly lower pension benefits than men. Any fiduciary decision that reduces benefits to women obviously exacerbates the disparity. Thus, review of the decision below is of major importance to countless thousands of women who rely heavily on employee pensions in retirement.

Indeed, women usually have more at stake than men do in their retirements. On average, women live seven years longer than men and thus need financial resources for a decisively longer period.[16] The general population is also

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15. Much of the text in this section was taken from an *amicus* brief that AARP attempted to submit in the Seventh Circuit below.

16. Women lived on average 7.4 years longer than men in 1980; 6.8 years in 1988; and women can expect to live 6.9 years longer than men by 2010. *See* Women's Bureau, U.S. Dep't of Labor, *1993 Handbook on Women Workers: Trends & Issues*, at 149 (1994).

getting older, and it is becoming more female as it does — women account for more of the nation's over-65 population than men,[17] a trend which is expected to continue.[18]

Retirement benefits are calculated based on wage levels and length of service, but women get paid approximately seventy-five percent of men's earnings for comparable work. *See* Women's Bureau, U.S. Dep't of Labor, *Equal Pay: A Thirty-Five Year Perspective*, at 14 (June 1998) (women continue to earn about 76 cents for every dollar earned by men).[19] Older women receive fewer benefits in retirement in part because they received lower wages while working.

Pay inequity is due, in part, to pregnancy and family leave. *Women's Pay Gap Still Not Closed*, Newsday, Apr.

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17. The most recent estimates of the population by the Bureau of Census indicate that almost 13% of the U.S. population is over age 65. Of those over 65 in 1998, more than 20 million are women; some 14 million are men. Bureau of the Census, U.S. Dep't of Commerce, *Recent Population of the United States: Estimates, by Age and Sex* (visited Nov. 2, 1998) <http://blue.census.gov/population/estimates/nation/intfile2-1.txt>.

18. Due to the aging of the baby-boomers (those born between 1946 and 1964), projections indicate that by 2010 there will be more than 39 million people over age 65, 22.5 million of whom will be women; by 2030 the number jumps to 70 million overall, with 38 million being women. *Id.* at <http://blue.census.gov/population/projections/nation/nas/npas>. *See also* Linda J. Waite, *The Demographic Face of America's Elderly*, 33 Inquiry 220, 220 (Fall 1996).

19. Median annual earnings in real dollars for year-round, full-time workers was $32,144 for men and $23,710 for women, a difference of over $8,000. *Id.* App. B, at 58.

14, 1998, at A70.[20] Taking time off to bear and care for children, as well as to care for sick relatives, not only contributes to the pay differential, but also results in forfeiting seniority and pay increases. Pat Swift, *A Way to Figure What the Pay Gap Will Cost You*, The Buffalo News, Sept. 12, 1998, at 13B. Moreover, women earn less than men in 99% of all occupations. *See* Women's Bureau, U.S. Dep't of Labor, *Equal Pay: A Thirty-Five Year Perspective*, *supra*, at 30. Even in occupations traditionally dominated by women, men earn substantially more. Pat Swift, *The Gap is Closing But the Inequity in Pay Remains*, The Buffalo News, Mar. 28, 1998, at 7C.

Women fall short of their male counterparts in retirement income security. Those over 65 years old had 41% less real income than men in 1994. Employee Benefit Research Inst., *EBRI Databook on Employee Benefits*, at 50, tbl. 6.1 (4th ed. 1997) (women drew $8,950; men $15,250). The immediate cause of this difference is evident — women receive less money than men from all three major sources of retirement income. They draw lower Social Security benefits, receive less from employer-based pensions, and tend to save fewer dollars for retirement.

Older women receive less in private pension benefits than older men. Employer-provided pensions comprise between one-quarter and one-third of total retirement income,

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20. Ann Scott Tyson, Another Day, Another 75 Cents, Where Women Stand — 150 Years After the Women's Rights Movement Began, Christian Science Monitor, July 17, 1998, at 7. See generally AFL-CIO, Equal Pay: Facts About Working Women (visited Nov. 2, 1998) <http://135.145.13.100/women/wwfacts.htm>; see also U.S. Gen. Acc't Office, Social Security Reform, Implications for Women's Retirement Income (GAO/HEHS-98-42, Dec. 1997).

depending on marital status, for those individuals receiving such benefits. In 1995, the median pension benefit amount for women was considerably less than for men.[21]

This disparity remains with women as they age — in 1996, half of all older women drawing a private pension received less than $3,679 per year, compared with $6,442 per year for older men. AFL-CIO, *Fact Sheet: Equal Pay and Retirement* (visited Nov. 2, 1998) <http://135.145.12.100/women/retiremt.htm>. This disparity is attributable both to women spending less time in the workforce than men in large part because of family care giving responsibilities as well as pay inequity. Employee Benefit Research Inst., *EBRI Databook on Employee Benefits*, at 63 (4th ed. 1997).

Against this background, perpetuation of pregnancy discrimination in the current calculation of service credit is simply unconscionable. Whatever the lawfulness of that discrimination prior to the PDA, today's pension plan participants are owed a fiduciary duty under ERISA that precludes such discrimination.

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21. Employee Benefit Research Inst., *EBRI Databook on Employee Benefits*, 65-66, tbls. 81 & 82 (4th ed. 1997) (women 65-and-older received $4,200; men $7,800).

CONCLUSION

This case presents an issue of great importance to tens of thousands of women who bore children before 1979 and who are now reaching early retirement age. If the Court does not act now, the opportunity to correct this injustice will pass as the pre-PDA generation leaves the workforce. These women are entitled to the fiduciary protections that Congress set forth in ERISA. The issue of whether perpetuating pregnancy discrimination is a breach of fiduciary duty has split the Circuits and desperately needs resolution by this Court. For these reasons the Writ should be granted.

Respectfully submitted,

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No. 00-864

In the Supreme Court of the United States

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, BERNADETTE BERNABEI, ANNETTE FOSTER-HALL, *et al.*,
Petitioners,

v.

AMERITECH BENEFIT PLAN COMMITTEE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does Title VII, the Equal Pay Act, or ERISA require that employers and benefit plans re-calculate the service credit of employees who took pregnancy-related leaves of absence prior to the effective date of the Pregnancy Discrimination Act of 1978 when they determine eligibility for current benefit programs?

RULE 29.6 STATEMENT

Respondents include the following corporate entities:

Ameritech Corporation, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Ameritech Services, Inc., Ameritech Advanced Data Services of Illinois, Inc., Ameritech Advanced Data Services of Indiana, Inc., Ameritech Advanced Data Services of Michigan, Inc., Ameritech Advanced Data Services of Ohio, Inc., Ameritech Advanced Data Services of Wisconsin, Inc., Ameritech Mobile Communications, Inc., Ameritech Information Systems, Inc., Ameritech Credit Corporation, Ameritech Development Corporation, Ameritech International, Inc., Ameritech Publishing, Inc., Ameritech Interactive Media Services, Inc., Ameritech New Zealand Limited, Ameritech Health Connections, Inc., Ameritech Long Distance Industry Services, Inc., Ameritech Communications, Inc., New Media Enterprises, Inc., and Ameritech Telecommunications Services Company.

Each of the Respondents is ultimately owned by SBC Communications, Inc., a publicly held company. For each Respondent that is a corporation, the following lists its parent corporation, if any, and stockholders which are publicly held companies owning 10% or more of the stock in the Respondent:

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Corporation	SBC Communications, Inc.	SBC Communications, Inc.

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Illinois Bell Telephone Company	Ameritech Corporation	None
Indiana Bell Telephone Company, Inc.	Ameritech Corporation	None
Michigan Bell Telephone Company	Ameritech Corporation	None
The Ohio Bell Telephone Company	Ameritech Corporation	None
Wisconsin Bell, Inc.	Ameritech Corporation	None
Ameritech Services, Inc.	Illinois Bell Telephone Co.	None
	Indiana Bell Telephone Co., Inc.	None
	Michigan Bell Telephone Co.	None
	The Ohio Bell Telephone Co.	None
	Wisconsin Bell, Inc.	None

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Advanced Data Services of Illinois, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Indiana, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Michigan, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Ohio, Inc.	Ameritech Corporation	None
Ameritech Advanced Data Services of Wisconsin, Inc.	Ameritech Corporation	None
Ameritech Mobile Communications, Inc.	Ameritech Corporation	None
Ameritech Information Systems, Inc.	Ameritech Corporation	None

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Credit Corporation	Ameritech Corporation	None
Ameritech Development Corporation	Ameritech Corporation	None
Ameritech International, Inc.	Ameritech Corporation	None
Ameritech Publishing, Inc.	Ameritech Corporation	None
Ameritech Interactive Media Services, Inc.	Ameritech Publishing, Inc.	None
Ameritech New Zealand Limited	Ameritech Corporation	None
Ameritech Health Connections, Inc.	Ameritech Information Systems, Inc.	None
Ameritech Denmark, Inc.	Ameritech International, Inc.	None
Ameritech Communications, Inc.	Ameritech Corporation	None
Ameritech New Media, Inc.	Ameritech Corporation	None

Corporate Respondent*	**Parent Corporation(s)**	**Publicly Held Stockholder(s)**
Ameritech Telecommunications Services Company	Ameritech Corporation	None

*All of the Respondents listed existed at the time this lawsuit was filed. Although several have gone out of existence following the merger of Ameritech Corporation and SBC Communications, Inc., in the interest of completeness we continue to list them all.

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STATEMENT

This case presents an issue of great importance to employers, pension plan administrators, employees and plan participants throughout the United States: whether employers and pension plans must re-calculate the seniority of female employees who took pregnancy-related leaves prior to the effective date of the Pregnancy Discrimination Act of 1978 ("PDA") and who did not receive seniority credit for those leaves under circumstances in which seniority credit would have been required after the PDA became effective. As petitioners point out, the issue presented affects tens of thousands of female employees in the telecommunications industry and an untold number of employees and employers in other industries. The square conflict between the Seventh Circuit and the Ninth Circuit on identical facts, the E.E.O.C.'s administrative guidelines rejecting the Seventh Circuit's decision and its continuing enforcement proceedings against employers that administer their pension plans in accordance with the Seventh Circuit's decision, the ongoing efforts of federal courts to decide the same issue, and the critical importance of the issue for employers, pension plans, and the many women involved, all call for this Court's review. Accordingly, even though Ameritech is confident that the Seventh Circuit's decision is correct, we do not oppose review of the court of appeals' decision by this Court.

1. For most of the time prior to the 1979 effective date of the PDA, Ameritech[1/] treated maternity or pregnancy leaves

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[1/] Ameritech Corporation did not come into existence until 1984 (five years after the effective date of the PDA) as part of the AT&T divestiture. Although many of the events relevant to this case involved Ameritech's predecessors and occurred before Ameritech was created, we will follow the convention of the courts below and the petitioners and (unless the context

as personal leaves, which entitled employees to a maximum of 30 days credit under the company's seniority system (referred to as the "Net Credited Service" or "NCS" system). Pet. App. 3a.[2/] Employees (male or female) who took disability leaves during the same time period received full NCS seniority credit. *Ibid.* As of the effective date of the PDA, Ameritech modified its policies to comply with the statute, but it did not go back and re-calculate the seniority of employees who took leaves prior to the PDA-mandated amendments. Seniority calculated under the NCS system continued to govern eligibility for retirement under the Ameritech pension plans, including early retirement programs put into effect by plan amendments in 1991, 1992 and 1994. *Id.* at 3a-4a, 22a-23a. Accordingly, some employees who took pregnancy or maternity leaves prior to the effective date of the PDA, and who did not receive full seniority credit for those leaves, found that they were not eligible to receive the early retirement benefits that they would have been eligible for had they received full NCS seniority credit for those leaves. *Id.* at 4a.

Petitioners Cheryl Cuprys and Bernadette Bernabei both challenged the denial of their claim for benefits under the 1994 early retirement program. Pet. App. 4a. After their claims

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dictates otherwise) use "Ameritech" to refer to Ameritech Corporation, the other respondents (all affiliates of Ameritech), and their predecessors. Pet. App. 1a, 22a; Pet. 3 n.1.

[2/] The NCS system involves adjustment of an employee's hire date to account for absences that are not entitled to seniority credit. For example, if an employee hired on January 1, 1970, took a nine-month maternity leave in 1972 and was entitled to only one month's seniority credit, her hire date would be adjusted by eight months (to September 1, 1970) in order to "squeeze out" the portion of her leave for which she was not entitled to seniority credit. Pet. App. 22a.

were denied by the Ameritech Benefit Plan Committee, they each filed charges of discrimination with the E.E.O.C., which issued right to sue letters. *Ibid.* On December 20, 1995, Bernabei filed suit in the United States District Court for the Northern District of Ohio, claiming that Ameritech's application of its NCS seniority system to her claim for early retirement benefits violated Title VII, the Equal Pay Act, ERISA and state law. *Ibid.* While that case was pending, on March 3, 1997, Ameritech filed suit in the Northern District of Illinois seeking a declaratory judgment that it had not violated any of those laws. *Id.* at 4a-5a. Named as defendants were 36 present and former Ameritech employees as representatives of a class, the Communications Workers of America, AFL-CIO ("CWA"), and the International Brotherhood of Electrical Workers, Local Nos. 165, 188, 336, 383 and 399 ("IBEW"). *Id.* at 4a-5a, 20a-21a. In May of 1997, the district court in Ohio transferred the *Bernabei* case to Illinois and it was consolidated with Ameritech's lawsuit. *Id.* at 5a. The Unions and the 36 named defendants were joined by over 900 individual women who intervened in the action, including Ms. Cuprys. *Id.* at 10a & n.1, 42a-55a; Pet. 7.

2. On July 20, 1998, the district court granted Ameritech's motion for summary judgment and denied petitioners' cross-motion. Pet. App. 20a-39a. Turning first to the Title VII claim, the court described the different perspectives of the parties:

> Ameritech characterizes the harm resulting from its reliance on net credited service dates as the *effect* of discrete acts taken before 1979: its predecessors' refusal to grant more than 30 days service credit for pregnancy and maternity leaves and the corresponding adjustments to employees' net credited service dates upon their return to work. The employees characterize the harm resulting from Ameritech's

> current reliance on net credited service dates as a fresh act of discrimination; in other words, each time Ameritech bases employment decisions on net credited service dates – without re-calculating net credited service to remedy the effects of its predecessors' pre-1979 leave policies – it makes a fresh decision to exclude pre-1979 pregnancy leave and affirmatively adopts a facially discriminatory policy.

Id. at 26a. The controlling legal issue was whether petitioners' claims were timely. *Ibid.* Petitioners argued that their claims were timely under three theories: (1) the calculation of net credited service is facially discriminatory and thus may be challenged at any time; (2) the NCS system was adopted for discriminatory purposes and may be challenged at any time; and (3) the reliance on NCS seniority constitutes a "continuing violation." *Id.* at 27a.

The district court held that the calculation of net credited service was not facially discriminatory, expressly rejecting the Ninth Circuit's decision in *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991). Pet. App. 27a-30a. "To the extent *Pallas* concludes that reliance on net credited service dates without re-calculating pre-1979 net credited service based on post-1979 law is a facially discriminatory policy, this court finds *Pallas* unpersuasive and respectfully declines to follow it." *Id.* at 30a. The court also rejected petitioners' argument that *Bazemore* v. *Friday*, 478 U.S. 385 (1986), required a holding that Ameritech's practices were facially discriminatory: "*Bazemore* does not stand for the proposition that a facially neutral policy becomes facially discriminatory if the policy perpetuates discriminatory effects." *Id.* at 29a.

The district court then turned to and rejected petitioners' claim that Ameritech adopted the NCS system for a

discriminatory purpose because it knew that the NCS dates of employees who took pregnancy-related leaves prior to the effective date of the PDA did not provide full seniority credit for those leaves. Again the court declined to compel Ameritech to follow *Pallas*: "Nor are the issues presented by this lawsuit so straightforward that Ameritech was bound to accept *Pallas* (a 2-1 decision of the Ninth Circuit) or *Carter* [v. *AT&T*, 870 F. Supp. 1438 (S.D. Ohio 1994)] (a vacated memorandum opinion) as the definitive statement on the legality of net credited service dates that reflect pre-PDA policies. The fact that Ameritech continued to rely on net credited service dates after *Pallas* and *Carter* were decided is simply not evidence that Ameritech's decision was based on discriminatory animus." Pet. App. 31a-32a.

The district court held that *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), precluded petitioners' "continuing violation" claim. Pet. App. 32a-38a. "Admittedly, this case presents close and difficult questions about the scope of the 'continuing violation' doctrine in employment discrimination law. But the court is persuaded this case is more like *Evans*, *Teamsters* [v. *United States*, 431 U.S. 324 (1977)], [*Delaware State College* v.] *Ricks*, [449 U.S. 250 (1980)] and *Dasgupta* [v. *University of Wisconsin Board of Regents*, 121 F.3d 1138 (7th Cir. 1997)] than *Bazemore* and its progeny." Pet. App. 34a.

The court also granted Ameritech's summary judgment motion on the Equal Pay Act, ERISA and state law claims. Pet. App. 38a-39a. The court held that Ameritech's *bona fide* seniority system provided a "complete defense" to the Equal Pay Act claim. *Id.* at 38a. After questioning whether a claimant could "bootstrap" a sex discrimination claim into a breach of fiduciary duty claim under ERISA, the court held that reliance on a neutral seniority system does not breach a plan administrator's fiduciary duties even if it gives effect to pre-PDA policies. *Ibid.* Finally, the court held that the state law

claims "mirror" the Title VII and Equal Pay Act claims and were unsuccessful for the same reasons. *Id.* at 39a.

3. The court of appeals affirmed the district court's judgment. Pet. App. 1a-19a. The court first addressed a belated jurisdictional and ripeness challenge by the E.E.O.C., holding that the district court clearly had jurisdiction over Ameritech's declaratory judgment action. *Id.* at 5a-8a. Any jurisdictional doubt was completely put to rest by petitioners' counterclaims and by the consolidated *Bernabei* suit. *Id.* at 6a. The E.E.O.C.'s ripeness argument – based on a claimed failure to exhaust administrative remedies – also failed in light of the *Bernabei* lawsuit and the Cuprys intervention. Both Ms. Bernabei and Ms. Cuprys had filed discrimination charges with the E.E.O.C. and had received right to sue letters. *Id.* at 7a. Under the circumstances, there could be no doubt as to jurisdiction or ripeness. *Id.* at 7a-8a.[3/]

On the merits, the Seventh Circuit first addressed the Title VII claim. Pet. App. 11a-16a. The court of appeals characterized the case as turning on whether *Bazemore* (relied upon by petitioners) or *Evans* (relied upon by Ameritech) provides the "better fit." *Id.* at 12a. The court "acknowledge[d] that the line between continuing violations that arise with each new use of the discriminatory act (*e.g.*, the *Bazemore* paychecks) and past violations with present effects (*e.g.*, the *Evans* seniority) is subtle at best." *Id.* at 14a. The court found significant the fact that this case, like *Evans*, involved seniority.

[3/] On its own initiative the court of appeals questioned the propriety of certifying the case as a class action under Fed. R. Civ. P. 23(b)(1) and 23(b)(2). The court did not decertify the class, but limited the effect of its decision to the named parties and intervenors. Pet. App. 10a. Petitioners have not raised the class issue in this Court, and Ameritech is not cross-petitioning the Court to review that issue.

Title VII itself affords special deference to the operation of *bona fide* seniority systems "as long as the differences are not the result of an intention to discriminate." *Ibid.* Three factors influenced the court's holding that there was no such intent to discriminate: (1) the Supreme Court's holdings prior to the PDA that Title VII did not prohibit discrimination based upon pregnancy; (2) the non-retroactive treatment of the PDA in the courts; and (3) this Court's *Teamsters* decision holding that the perpetuation of pre-Act discrimination does not preclude a seniority plan from being *bona fide* within the meaning of Title VII. *Id.* at 15a. The employees affected by Ameritech's pre-PDA policies knew at the time they returned to work that they did not receive full seniority credit for their leaves and that the reduced credit would have an impact on benefits; "[t]he time for bringing a complaint was therefore long ago, and the district court correctly recognized that these employees had sued too late." *Id.* at 16a.

The court of appeals found that Ameritech had met its burden of demonstrating that the *bona fide* seniority system affirmative defense defeated petitioners' Equal Pay Act claims, which were also untimely. Pet. App. 16a-17a.

As to the ERISA claims, the Seventh Circuit held that "Ameritech's decision to use NCS to calculate time of employment cannot evidence an intent to discriminate if the NCS system itself has passed muster under the antidiscrimination laws." Pet. App. 18a. In addition, ERISA itself does not prohibit discrimination in the provision of benefits. *Ibid.*; *citing Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Although it is not clear whether discrimination against plan participants could ever constitute a breach of fiduciary duty under ERISA, "this is not such a case." Pet. App. at 18a-19a. Plan fiduciaries cannot "cater to the optimal needs of each individual beneficiary," but are instead required to act as "a reasonably prudent business person with the

interests of all the beneficiaries at heart." *Id.* at 19a. Ameritech's adherence to the NCS system for all participants met that standard. *Ibid.*

4. The court of appeals denied Ameritech's petition for rehearing and rehearing *en banc* on August 31, 2000,[4/] and petitioners timely filed their petition for certiorari on November 28, 2000. Pet. App. 40a-41a.

ARGUMENT

There can be no question that there is a conflict among the circuits on the important issues presented by this case and that, absent resolution of the conflict, the lower federal courts will continue to struggle over which line of circuit authority to follow. Moreover, the E.E.O.C. – the federal agency charged with administering Title VII – interprets the statute completely contrary to what the court of appeals and the district court held in this case, and continues enforcement action against employers on that basis. In fact, respondent Ameritech, having prevailed in this lawsuit in Illinois, is nonetheless the defendant in a lawsuit brought by the E.E.O.C. in Ohio based on the very same Title VII and Equal Pay Act theories rejected by the Seventh Circuit in this case. Unless the legal issues are resolved, employers will be subject to such lawsuits whenever they initiate early retirement or other special pension enhancement programs on the theory that each new application of pre-PDA seniority is a new violation of Title VII, ERISA and the Equal Pay Act. The need to clarify the law is so great that even though Ameritech prevailed in the Seventh Circuit, it

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[4/] Ameritech unsuccessfully sought to have the court of appeals reconsider its limitation of the decision to the named parties and intervenors, to the exclusion of absent class members. Pet App. 8a-11a.

does not oppose review of the court of appeals' decision by this Court.

1. In *Pallas* v. *Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), the employer (like Ameritech) was a telecommunications company that came into existence upon the divestiture of AT&T in 1984. Again like Ameritech, it inherited the Net Credited Service seniority system, which reflected the same limitations on seniority credit for pregnancy-related leaves taken prior to the PDA. Ms. Pallas attempted to take advantage of an early retirement program instituted in 1987, but was told that she had a few days too little service credit to be eligible for early retirement. She filed suit, claiming that by not giving her full NCS service credit for pregnancy leaves she had taken prior to 1979, Pacific Bell had violated Title VII and ERISA. The district court dismissed Pallas's Title VII claim, relying on *Evans* and *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), but the Ninth Circuit reversed, holding that the "controlling Supreme Court precedent" was *Bazemore*, not *Evans*. 940 F.2d at 1327. The Ninth Circuit also held that Pallas had stated a claim under ERISA. *Ibid.* One member of the panel (Judge Dumbauld) dissented on the Title VII issue, but agreed with the majority on the ERISA claim. *Id.* at 1327-1329.

The Seventh Circuit reached the exact opposite result on indistinguishable facts in the present case. The issue again was whether the employer violated Title VII and ERISA (and also the Equal Pay Act) when its failure to give full NCS seniority credit for pre-PDA pregnancy left employees ineligible for benefits under new early retirement or pension enhancement initiatives. The Seventh Circuit also looked to *Bazemore* and *Evans* for guidance, but concluded that *Evans* controlled and that Ameritech had not violated Title VII. Pet. App. 11a-16a. Again contrary to the Ninth Circuit, the Seventh Circuit held

that Ameritech had not violated ERISA. *Id.* at 17a-19a.[5/] It is hard to imagine a more direct conflict.

2. Unless the conflict is resolved by this Court, other federal courts will struggle with the conflicting circuit authority. Already, in *EEOC* v. *Bell Atlantic Corp.*, 1999 U.S. Dist. LEXIS 8813, 1999 WL 386725 (S.D.N.Y. 1999), the district court considered the issue after the Illinois district court issued its *Ameritech* opinion. The court declined to follow the district court's holding in this case, noting that "the Ninth Circuit and a district court in Ohio [*Carter* v. *AT&T Co.*, 870 F. Supp. 1438 (S.D. Ohio 1994), vacated by consent, 1996 U.S. Dist. LEXIS 21836, 1996 WL 656571 (S.D. Ohio Sept. 13, 1996)] have held, on similar facts, that discrimination claims based upon the adoption of early retirement plans were not untimely." 1999 U.S. Dist. LEXIS 8813, at *12, 1999 WL 386725, at 4. The district court concluded that the *Ameritech* case had been "wrongly decided." 1999 U.S. Dist. LEXIS 8813, at *13, 1999 WL 386725, at 4.

3. The E.E.O.C.'s administrative guidelines and its persistent enforcement efforts further prove that the issue

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[5/] In *Redding* v. *AT&T Corp.*, 1997 WL 537882 (10th Cir. 1997), the court held that, absent plan language creating an entitlement to retroactive service credit, ERISA itself does not provide a cause of action for plan participants complaining of denial of service credit for pre-ERISA (*i.e.*, pre-1975) pregnancy-related leaves. "Ms. Redding's general reference to discretionary authority, unsupported by any references to plan provisions that would support her entitlement to the subject benefits, constitutes a conclusion that is insufficient to state a claim." *Id.* at *4. Like the employees in this case and *Pallas*, Redding claimed that the 1995 denial of her claim for an adjustment of benefits was a current violation of ERISA, but the court of appeals affirmed the dismissal of her suit.

presented in this case (and thus the difficulty caused by the circuit conflict) is not going to go away on its own. The E.E.O.C. COMPLIANCE MANUAL includes the following discussion:

> Employers must allow women who are on pregnancy-related leaves to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. * * *
>
> These principles also apply to pregnancy-related leaves taken before the effective date of the PDA, where an employer uses years of service to establish eligibility for retirement benefits.
>
> EXAMPLE - CP took maternity leave in 1975, before passage of the PDA. At the time, her employer's policy denied any accrual of service credit during maternity leaves, although it permitted employees on leave for other medical reasons to accrue service credit during their leaves. Although the employer changed its policy in 1979 to conform to the PDA and to treat maternity leave similarly to other medical leaves, it never gave CP credit for her pre-PDA leave.
>
> In 1996, CP's employer implements an incentive program that authorizes employees with 25 or more years of service to take early retirement with full pensions. Because she took a maternity leave for which she accrued no years of service credit, CP falls short of the 25 year service requirement and files a charge challenging discrimination on the basis of pregnancy.

> CP's claim is timely and states a violation of the PDA. In evaluating eligibility for early retirement in 1996, the employer has distinguished between employees who took leave prior to 1979 due to a pregnancy-related disability and employees who took leave prior to 1979 for other temporary disabilities. While the denial of service credit to women on maternity leave was not unlawful when CP took her leave in 1975, the employer's decision to incorporate that denial of service credit in calculating seniority in 1996 is discriminatory.

E.E.O.C. COMPLIANCE MANUAL, No. 915.003 (Oct. 3, 2000). In a footnote to this passage, the E.E.O.C. manual cites *Pallas* with approval, and includes a "but see" citation to the Seventh Circuit's decision in this case. "The Commission disagrees with the court's analysis in *Ameritech* and believes that the *Pallas* decision states the correct application of the law." *Id.* at n.96.

True to its administrative guidelines, the E.E.O.C. is continuing its lawsuit against Ameritech in Ohio, making the identical Title VII and Equal Pay Act claims the Seventh Circuit rejected in this case. *EEOC* v. *Ameritech Services, Inc.*, No. 97 CV 2106 (N.D. Ohio). In addition to *EEOC* v. *Bell Atlantic* in the Southern District of New York, *supra*, judging from "preemptive strikes" filed against the E.E.O.C. in Virginia and the District of Columbia, the Commission apparently is also pursuing enforcement actions against the Bell Atlantic Cash Balance Plan and AT&T. *See Bell Atlantic Cash Balance Plan* v. *EEOC*, 976 F. Supp. 376, 378 (E.D. Va. 1997) (employer and pension plan filed declaratory judgment action after the E.E.O.C. issued a reasonable cause determination "finding that Bell Atlantic's application of the 'facially neutral service system has a disparate impact on * * * females who took pregnancy leave prior to 1979'"), aff'd, 182 F.3d 906 (4th

Cir. 1999); *AT&T Corp.* v. *EEOC*, 99 Civ. 1444 (TFH) (D.D.C. July 13, 2000), appeal docketed, No. 00-5280 (D.C. Cir. Aug. 4, 2000). If the Seventh Circuit's decision is correct – and we certainly believe that it is – these companies, thousands of employees and participants, and the government will be subjected to years of litigation, expense and uncertainty for no reason.

4. This case cannot be disregarded as a short-lived problem or as something affecting only a small and discrete group of companies (former AT&T affiliates) and their employees. Female employees who took pregnancy leaves in the late 1970s may now be only in their early forties, and may very well continue in the workforce for another twenty-five years or more.[6] Whenever their employers initiate limited-time early retirement or pension enhancement programs it is likely that some of the women will not meet the service requirements and will be able to claim that they would have met those requirements had they been given full service credit for their pregnancy leaves.

Although the litigation to date has focused primarily on AT&T and its former subsidiaries and affiliates,[7] that does not lessen the need for this Court's review. To begin with, AT&T

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[6] The plaintiff in *Redding* v. *AT&T Corp.* began working for an AT&T subsidiary in 1942, and retired in 1989. The Tenth Circuit's opinion does not indicate when she took the first of her twelve pregnancy-related leaves, but it seems a safe assumption that she did so 40 or even 50 years or more before she filed her lawsuit in 1996.

[7] *But see Whitehead* v. *Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1192 (10th Cir. 1999) (unsuccessful PDA claim by employee terminated as a result of pregnancy in 1969 and later rehired with no "bridging" of service credit).

and the companies that arose from AT&T following divestiture have an enormous impact on the economy, and employ hundreds of thousands of workers. Companies like Ameritech and its parent, SBC Communications, Inc., operate in several states and in several federal circuits.[8/] In addition, although AT&T and its former affiliates may have the dubious honor of being the first targets of this litigation, when Congress enacted the PDA, it considered policies limiting service credit for pregnancy-related leaves to be a problem generally. *See* S. Rep. No. 95-331, at 6 (1977); H.R. Rep. No. 95-948, at 6 (1978). Such policies were apparently common in industries that employed a large number of women, including education and airlines. *See, e.g., James* v. *Delta Airlines, Inc.*, 571 F.2d 1376 (5th Cir. 1978); *Masco* v. *United Air Lines, Inc.*, 574 F.2d 1127 (3d Cir. 1978); *Thompson* v. *Board of Educ.*, 526 F. Supp. 1035 (W.D. Mich. 1981); *Flaum* v. *Board of Educ.*, 450 F. Supp. 191 (S.D.N.Y. 1978). If the E.E.O.C. and the Ninth Circuit are correct, employers in these and other industries will certainly also be the subject of future enforcement proceedings and litigation.

In addition, the approach to Title VII, ERISA and the Equal Pay Act reflected in *Pallas*, *Bell Atlantic Corp.*, and the E.E.O.C.'s complaints and administrative materials is not readily limited to pregnancy leaves. The E.E.O.C. COMPLIANCE MANUAL acknowledges that the pregnancy leave policies at issue in these cases was lawful prior to the effective

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[8/] Ironically, Ameritech and Pacific Bell, the employer involved in *Pallas*, are now both subsidiaries of SBC Communications, Inc.; SBC subsidiaries and pension plans are thus already subject to different standards of federal law in different jurisdictions.

date of the PDA.[2/] If the Ninth Circuit's and the E.E.O.C.'s analysis is correct, it would also apply to other policies that were lawful before the effective date of Title VII, or before the effective date of other statutes amending Title VII, and it would also apply to other antidiscrimination laws, including the Age Discrimination in Employment Act and the Americans With Disabilities Act. For example, if *Pallas* and the E.E.O.C. are correct, would not someone claiming to have been denied a job because of race, sex or religious discrimination before Title VII became effective in 1965 have a claim for additional service credit to qualify for post-Title VII retirement programs?

5. The legal issues presented by this case are not complicated and do not vary depending on the facts of each case. There is a plain disagreement between the Seventh Circuit and the Ninth Circuit, and between employers and benefit plan administrators on the one hand, and the E.E.O.C., several unions, employees and plan participants on the other hand, concerning the application of Title VII, ERISA and the Equal Pay Act to a common set of facts. In these circumstances, the Court's consideration would not benefit from further litigation in the courts of appeals.

[2/] "While the denial of service credit to women on maternity leave was not unlawful when CP took her leave in 1979 * * *." E.E.O.C. COMPLIANCE MANUAL, No. 915.003 (Oct. 3, 2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2000